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Reports of decisions of the Supreme Cour



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law

R E P O R T S
OF
DECISIONS
OF
THE SUPREME COURT
OF
THE STATE OF ILLINOIS;

FROM THE DECEMBER TERM, 1819, TO THE FEBRUARY TERM, 1841, INCLUSIVE, WHICH WERE
EMBRACED IN BREESSE, AND VOLUMES ONE AND TWO SCAMMON'S REPORTS.

WITH NOTES, REFERRING TO PRIOR AND SUBSEQUENT DECISIONS
ILLUSTRATING THE DOCTRINE OF THE TEXT:

CONTAINING A TABLE OF CASES, AND A COMPLETE INDEX.

BY ROBERT S. BLACKWELL,
AUTHOR OF "BLACKWELL ON TAX TITLES," AND COMPILER OF "SCATES, TREAT AND BLACKWELL'S REVISED
STATUTES OF ILLINOIS."

VOL. I.

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PUBLISHER'S ADVERTISEMENT.

The decisions of the Supreme Court of Illinois, from the organization of the Court in 1818, until the present time, are embraced in twenty-six volumes—one by Breese, four by Scammon, five by Gilman, and sixteen by Peck.

The original price of these Reports was \$130.00. None of them have been stereotyped, and only small editions were printed, consequently the first eighteen volumes are already out of print and difficult to obtain. It was supposed by the publisher, that a condensed edition, at less than one-third of the price of the old series, would be acceptable to the profession. Accordingly the first volume of the new series is now presented to the bench and bar.

The second volume, embracing 3 and 4 Scammon, 1, 2 and 3 Gilman, is ready for the press and will follow speedily.

The object of the Editor of this edition of the Illinois Reports, is to give a complete history of our jurisprudence, not only of the Statute upon which a decision was founded, but all prior and subsequent decisions of our Supreme Court, which tended to illustrate the doctrine of the text.

In order not to defeat the object of a judicial report, he has followed this plan.

FIRST.—To insert the opinion, *in full*, of our Supreme Court, in all cases which involved questions of *right*.

SECOND.—Where the questions decided related to remedies and practice, pleadings or evidence, he has omitted the reasoning of the judges.

CHICAGO, July, 1862.

ERRATA.

Page 84—*Reynolds v. Mitchell*, in syllabus No. 1, third line, after word “*and*” read “*not*” by bill in equity; and in syllabus No. 2, first line, read “*upon*” instead of “*before*.”

Page 423—*Gilbert v. Maggord*, in syllabus No. 1 read “*acknowledgment*” instead of “*acknowledgments*.”

Page 499—*Harrison v. Singleton*, in syllabus No. 4, second line, read “*property*” instead of “*properly*.”

Page 533—*Field v. People*, in syllabus No. 8, first line, read “*construction*” instead of “*constructions*.”

TABLE OF CASES.

	A	PAGE
Ackless <i>v.</i> Seekright.....	(Bre. R. 46)	32
Adams <i>v.</i> Colton	(2 Scam. R. 71)	530
Same <i>v.</i> Smith	(Bre. R. 221)	142
Aiken <i>v.</i> Deal.....	(1 Scam. R. 327)	342
Allen <i>v.</i> Downing.....	(2 Scam. R. 454)	641
Allison <i>v.</i> Clark	(Bre. R. 273)	171
Anglin <i>o.</i> Nott	(1 Scam. R. 395)	394
Ankeny <i>v.</i> Pierce.....	(Bre. R. 202)	142
Same <i>v.</i> Same.....	(Bre. R. 225)	125
Archer <i>v.</i> Ross.....	(2 Scam. R. 303)	591
Same <i>v.</i> Spillman.....	(1 Scam. R. 553)	465
Arenz <i>v.</i> Reihle	(1 Scam. R. 340)	349
Armstrong <i>v.</i> Caldwell	(1 Scam. R. 546)	463
Same <i>v.</i> Same.....	(2 Scam. R. 418)	624
Arnold <i>v.</i> Johnson.....	(1 Scam. R. 196)	288
Atkinson <i>v.</i> Lester	(1 Scam. R. 407)	398
Auditor <i>v.</i> Hall	(Bre. App. 8).....	188
Ayres <i>v.</i> Lusk.....	(1 Scam. R. 536)	460
Same <i>v.</i> McConnel.....	(2 Scam. R. 307)	591

	B	
Bacon <i>v.</i> Wood	(2 Scam. R. 265).....	569
Bailey <i>v.</i> Campbell	(1 Scam. R. 47)	210
Same <i>v.</i> Same.....	(1 Scam. R. 110)	251
Baker <i>v.</i> Whiteside	(Bre. R. 132)	82
Balance <i>v.</i> Frisby	(1 Scam. R. 595)	487
Same <i>v.</i> Same.....	(2 Scam. R. 63)	526
Baldwin <i>v.</i> The People	(1 Scam. R. 304)	329
Ballentine <i>v.</i> McDowell.....	(2 Scam. R. 28)	503
Ballingall <i>v.</i> Spraggins	(1 Scam. R. 330)	343
Bank of Washtenaw <i>v.</i> Montgomery	(2 Scam. R. 422)	625
Barret <i>v.</i> Gaston	(Bre. R. 196)	120
Bates <i>v.</i> Jenkins.....	(Bre. App. 25)	196
Same <i>v.</i> Wheeler	(1 Scam. R. 54)	213
Beaird <i>v.</i> Foreman	(1 Scam. R. 40)	205

	PAGE
Beaird v. Foreman.....(Bre. R. 303).....	183
Beams v. Denham.....(2 Scam. R. 58).....	522
Beaubien v. Barbour.....(1 Scam. R. 386).....	389
Same v. Brinckerhoff.....(2 Scam. R. 269).....	571
Same v. Holmes.....(2 Scam. R. 276).....	574
Same v. Sabine.....(2 Scam. R. 457).....	642
Beaugenon v. Turcotte.....(Bre. R. 126).....	78
Beaumont v. Yantz.....(Bre. R. 8).....	7
Beebe v. Boyer.....(Bre. App. 20).....	195
Beecher v. James.....(2 Scam. R. 462).....	643
Beer v. Philips.....(Bre. R. 19).....	18
Beezley v. Jones.....(1 Scam. R. 34).....	200
Bell v. Aydelott.....(Bre. R. 20).....	19
Same v. The People.....(1 Scam. R. 397).....	396
Bennet v. Schermer.....(Bre. R. 277).....	173
Bentley v. Doe.....(1 Scam. R. 240).....	303
Berry v. Hamby.....(1 Scam. R. 468).....	422
Same v. Savage.....(2 Scam. R. 261).....	568
Same v. Wilkinson.....(1 Scam. R. 164).....	276
Betts v. Francis.....(Bre. R. 125).....	77
Same v. Menard.....(Bre. R. 223).....	142
Same v. Same.....(Bre. App. 10).....	188
Biggs v. Postlewait.....(Bre. R. 154).....	96
Blackwell v. The Auditor.....(Bre. R. 152).....	96
Blair v. Sharp.....(Bre. R. 11).....	10
Same v. Worley.....(1 Scam. R. 178).....	283
Blevings v. The People.....(1 Scam. R. 172).....	281
Bliss v. Perryman.....(1 Scam. R. 484).....	430
Bloom v. Goodner.....(Bre. R. 35).....	26
Blue v. Weir.....(Bre. R. 293).....	181
Bogardus v. Trial.....(1 Scam. R. 63).....	220
Bond v. Betts.....(Bre. R. 153).....	97
Boon v. Juliet.....(1 Scam. R. 258).....	311
Bowers v. Green.....(1 Scam. R. 42).....	207
Bradshaw v. Newman.....(Bre. R. 94).....	52
Brazle v. Usher.....(Bre. R. 14).....	13
Brewster v. James.....(2 Scam. R. 464).....	644
Same v. Scarborough.....(2 Scam. R. 280).....	575
Brinkley v. Going.....(Bre. R. 288).....	180
Same v. Same.....(Bre. R. 289).....	180
Brookbank v. Smith.....(2 Scam. R. 78).....	532
Brooks v. Jacksonville.....(1 Scam. R. 563).....	472
Brother v. Cannon.....(1 Scam. R. 200).....	289
Browder v. Johnson.....(Bre. R. 61).....	42
Brown v. Knower.....(1 Scam. R. 469).....	422
Bruner v. Ingraham.....(1 Scam. R. 556).....	466
Same v. Manlove.....(1 Scam. R. 156).....	273
Bryan v. Buckmaster.....(Bre. App. 22).....	195
Same v. Smith.....(2 Scam. R. 47).....	515
Buckmaster v. Eddy.....(Bre. R. 300).....	182
Same v. Grundy.....(1 Scam. R. 310).....	330
Burlingame v. Turner.....(1 Scam. R. 588).....	485
Burton v. McClellan.....(2 Scam. R. 434).....	626

TABLE OF CASES.

vii

	PAGE
Bustard <i>v.</i> Morrison.....	(1 Scam. R. 235) 300
Butterfield <i>v.</i> Kinzie.....	(1 Scam. R. 445) 410
Butts <i>v.</i> Huntley.....	(1 Scam. R. 410) 399

C

Calhoun <i>v.</i> Webster.....	(2 Scam. R. 221) 548
Camden <i>v.</i> Robertson.....	(2 Scam. R. 507) 658
Campbell <i>v.</i> Humphries.....	(2 Scam. R. 478) 649
Same <i>v.</i> State Bank of Illinois.....	(1 Scam. R. 423) 401
Canal (Illinois & Michigan) <i>v.</i> Calhoun.....	(1 Scam. R. 521) 451
Carson <i>v.</i> Clark.....	(1 Scam. R. 113) 253
Carver <i>v.</i> Crocker.....	(1 Scam. R. 265) 315
Caton <i>v.</i> Harmon.....	(1 Scam. R. 581) 480
Chandler <i>v.</i> Gay.....	(Bre. R. 55) 40
Chippis <i>v.</i> Yancey.....	(Bre. R. 2) 2
Choisser <i>v.</i> Hargrave.....	(1 Scam. R. 317) 336
Christy <i>v.</i> McBride.....	(1 Scam. R. 75) 227
Church <i>v.</i> Jewett.....	(1 Scam. R. 55) 215
Clark <i>v.</i> Cornelius.....	(Bre. R. 21) 19
Same <i>v.</i> Harkness.....	(1 Scam. R. 56) 215
Same <i>v.</i> Lake.....	(1 Scam. R. 229) 299
Same <i>v.</i> Roberts.....	(Bre. R. 222) 142
Same <i>v.</i> Ross.....	(Bre. R. 261) 165
Same <i>v.</i> The People.....	(Bre. R. 266) 166
Same <i>v.</i> Same.....	(1 Scam. R. 117) 257
Clary <i>v.</i> Cox.....	(Bre. R. 181) 111
Clemson <i>v.</i> Hamm.....	(1 Scam. R. 176) 282
Same <i>v.</i> Kruper.....	(Bre. R. 162) 99
Same <i>v.</i> State Bank of Illinois.....	(1 Scam. R. 45) 210
Clifton <i>v.</i> Bogardus.....	(1 Scam. R. 32) 200
Cobb <i>v.</i> Ingalls.....	(Bre. R. 180) 110
Cole <i>v.</i> Chapman.....	(2 Scam. R. 34) 507
Coleen <i>v.</i> Figgins.....	(Bre. R. 3) 2
Coleman <i>v.</i> Henderson.....	(2 Scam. R. 251) 565
Coles <i>v.</i> County of Madison.....	(Bre. R. 116) 68
Collins <i>v.</i> Claypole.....	(Bre. R. 164) 100
Same <i>v.</i> Robinson.....	(2 Scam. R. 509) 658
Same <i>v.</i> Waggoner.....	(Bre. R. 26) 22
Same <i>v.</i> Same.....	(Bre. R. 143) 87
Conley <i>v.</i> Good.....	(Bre. R. 96) 52
Connolly <i>v.</i> Cottle.....	(Bre. R. 286) 179
Conradi <i>v.</i> Evans.....	(2 Scam. R. 185) 534
Cornelius <i>v.</i> Vanorsdall.....	(Bre. R. 5) 5
Same <i>v.</i> Boucher.....	(Bre. R. 12) 11
Same <i>v.</i> Cohen.....	(Bre. R. 92) 50
Same <i>v.</i> Coons.....	(Bre. R. 15) 14
Same <i>v.</i> Wash.....	(Bre. R. 63) 43
County of Vermilion <i>v.</i> Knight.....	(1 Scam. R. 97) 241
Same of Randolph <i>v.</i> Jones.....	(Bre. R. 103) 57
Covell <i>v.</i> Marks.....	(1 Scam. R. 391) 392
Same <i>v.</i> Same.....	(1 Scam. R. 525) 454
Cowhick <i>v.</i> Gunn.....	(2 Scam. R. 417) 624

	PAGE
Cowles v. Litchfield.....(2 Scam. R. 356).....	614
Cox v. McFerron.....(Bre. R. 10).....	9
Crain v. Bailey.....(1 Scam. R. 321).....	339
Crane v. Graves.....(Bre. R. 37).....	27
Creach v. Taylor.....(2 Scam. R. 277).....	574
Crisman v. Matthews.....(1 Scam. R. 148).....	268
Crocker v. Goodsell.....(1 Scam. R. 107).....	249
Crofts v. The People.....(2 Scam. R. 442).....	633
Cromwell v. March.....(Bre. R. 230).....	146
Same v. Same.....(Bre. App. 34).....	197
Cross v. Bryant.....(2 Scam. R. 36).....	508
Curtis v. Doe <i>ex dem.</i>(Bre. R. 99).....	53
Same v. The People.....(1 Scam. R. 285).....	321
Same v. Same.....(Bre. R. 197).....	121
Same v. Swearingen.....(Bre. R. 160).....	99
Cushing v. Dill.....(2 Scam. R. 460).....	642
Cushman v. Rice.....(1 Scam. R. 565).....	470

D

Davenport v. Farrar.....(1 Scam. R. 314).....	333
Same v. Gear.....(2 Scam. R. 495).....	654
Davis v. Hoxey.....(1 Scam. R. 406).....	397
Day v. Cushman.....(1 Scam. R. 475).....	424
Dazey v. Orr.....(1 Scam. R. 535).....	460
Dedman v. Barber.....(1 Scam. R. 254).....	310
Same v. Williams.....(1 Scam. R. 154).....	270
Delahey v. Clement.....(2 Scam. R. 575).....	687
Ditch v. Edwards.....(1 Scam. R. 129).....	263
Doe <i>ex dem.</i> v. Hill.....(Bre. R. 236).....	148
Doe v. Herbert.....(Bre. R. 279).....	173
Same v. Miles.....(2 Scam. R. 315).....	596
Same <i>ex dem.</i> McConnell v. Reed.....(2 Scam. R. 371).....	619
Same v. Johnson.....(2 Scam. R. 522).....	464
Dormandy v. State Bank of Illinois.....(2 Scam. R. 236).....	555
Drouillard v. Baxter.....(1 Scam. R. 191).....	286
Duncan v. Fletcher.....(Bre. R. 252).....	161
Same v. Ingles.....(Bre. R. 215).....	138
Same v. McAfee.....(2 Scam. R. 559).....	676
Same v. Morrison.....(Bre. R. 113).....	66
Same v. State Bank of Illinois.....(1 Scam. R. 262).....	314
Same v. The People.....(1 Scam. R. 456).....	416
Dunsetto v. Wade.....(2 Scam. R. 285).....	580

E

Earnest v. State Bank.....(Bre. App. 31).....	197
Easton v. Altum.....(1 Scam. R. 250).....	309
Edwards v. Beaird.....(Bre. R. 41).....	30
Same v. Todd.....(1 Scam. R. 462).....	417
Eldridge v. Huntington.....(2 Scam. R. 535).....	668
Ellett v. Todd.....(2 Scam. R. 214).....	545

TABLE OF CASES.

ix

	PAGE
<i>Elliot v. Sneed</i>(1 Scam. R. 517).....	449
<i>Ellis v. Snider</i>(Bre. R. 263).....	165
<i>Elston v. Blanchard</i>(2 Scam. R. 420).....	624
<i>Emerson v. Clark</i>(2 Scam. R. 489).....	651
<i>Same v. Same</i>(1 Scam. R. 596).....	487
<i>Ernst v. Ernst</i>(Bre. R. 247).....	161
<i>Evans v. Crosier</i>(1 Scam. R. 548).....	464
<i>Same v. Landon</i>(2 Scam. R. 53).....	517
<i>Same v. Lohr</i>(2 Scam. R. 511).....	659
<i>Same v. Pierce</i>(2 Scam. R. 468).....	645
<i>Everet v. Morrison</i>(Bre. R. 49).....	34
<i>Ex Parte Fellows</i>(2 Scam. R. 369).....	617

F

<i>Fail v. Goodtitle</i>(Bre. R. 156).....	97
<i>Fanny v. Montgomery</i>(Bre. R. 188).....	116
<i>Feazle v. Simpson</i>(1 Scam. R. 30).....	199
<i>Felt v. Williams</i>(1 Scam. R. 206).....	293
<i>Field v. The People</i>(2 Scam. R. 79).....	533
<i>Finley v. Ankeney</i>(Bre. R. 191).....	119
<i>Flack v. Same</i>(Bre. R. 144).....	89
<i>Same v. Harrington</i>(Bre. R. 165).....	100
<i>Foley v. The People</i>(Bre. R. 31).....	23
<i>Forester v. Guard</i>(Bre. R. 44).....	31
<i>Forsyth v. Baxter</i>(2 Scam. R. 9).....	492
<i>Foster v. Filley</i>(1 Scam. R. 266).....	310
<i>French v. Creath</i>(Bre. R. 12).....	11

G

<i>Galusha v. Butterfield</i>(2 Scam. R. 227).....	550
<i>Garner v. Crenshaw</i>(1 Scam. R. 143).....	267
<i>Same v. Willis</i>(Bre. R. 290).....	180
<i>Garrett v. Phelps</i>(1 Scam. R. 331).....	344
<i>Same v. Wiggins</i>(1 Scam. R. 335).....	345
<i>Gilbert v. Maggord</i>(1 Scam. R. 471).....	423
<i>Giles v. Shaw</i>(Bre. R. 87).....	48
<i>Same v. Same</i>(Bre. R. 169).....	103
<i>Gilham v. Cairns</i>(Bre. R. 124).....	76
<i>Gill v. Caldwell</i>(Bre. R. 27).....	23
<i>Gillet v. Stone</i>(1 Scam. R. 539).....	461
<i>Same v. Same</i>(1 Scam. R. 547).....	463
<i>Gillham v. State Bank of Illinois</i>(2 Scam. R. 245).....	564
<i>Same v. Same</i>(2 Scam. R. 248).....	564
<i>Gilmore v. Ballard</i>(1 Scam. R. 252).....	310
<i>Gleason v. Edmunds</i>(2 Scam. R. 448).....	638
<i>Godfrey v. Buckmaster</i>(1 Scam. R. 447).....	411
<i>Goodsell v. Boynton</i>(1 Scam. R. 555).....	466
<i>Gordon v. Knapp</i>(1 Scam. R. 488).....	432
<i>Gore v. Smith</i>(Bre. R. 206).....	129
<i>Gorham v. Peyton</i>(2 Scam. R. 363).....	616

	PAGE
Green v. McConnel	(Bre. App. 32) 197
Greenup v. Brown	(Bre. R. 193) 119
Greenup v. Porter	(2 Scam. R. 417) 624
Same v. Woodworth	(Bre. R. 179) 110
Same v. Same	(Bre. R. 194) 120
Greenwood v. Spiller	(2 Scam. R. 502) 657
Greer v. Wheeler	(1 Scam. R. 554) 465
Gregg v. Philips	(Bre. R. 107) 60
Grinsley v. Klein	(1 Scam. R. 343) 350
Guild v. Johnson	(1 Scam. R. 405) 397
Guykoski v. The People	(1 Scam. R. 476) 424

H

Hall v. Byrne	(1 Scam. R. 140) 266
Hamilton v. Blair	(2 Scam. R. 276) 574
Same v. Wright	(1 Scam. R. 582) 481
Hancock Co. v. Marsh	(2 Scam. R. 491) 653
Hannum v. Thompson	(1 Scam. R. 238) 303
Hargrave v. Bank of Illinois	(Bre. R. 84) 47
Same v. Penrod	(Bre. App. 15) 191
Harlan v. Scott	(2 Scam. R. 65) 527
Harmison v. Clark	(1 Scam. R. 131) 264
Harmon v. Thornton	(2 Scam. R. 351) 613
Harney v. Doe	(2 Scam. R. 480) 650
Harp v. Thomas	(Bre. R. 136) 84
Harris v. Jenks	(2 Scam. R. 475) 648
Harrison v. Singleton	(2 Scam. R. 21) 499
Hayes v. Gorham	(2 Scam. R. 429) 625
Heaton v. Kemper	(2 Scam. R. 367) 617
Herrington v. Hubbard	(1 Scam. R. 569) 473
Highland v. The People	(1 Scam. R. 392) 392
Holbrook v. The Peoria Bridge Company	(2 Scam. R. 32) 504
Same v. James	(2 Scam. R. 464) 644
Same v. Vibbard	(2 Scam. R. 465) 644
Holcomb v. Illinois and Michigan Canal	(2 Scam. R. 228) 551
Hollenback v. Williams	(1 Scam. R. 544) 462
Holiday v. Swailes	(1 Scam. R. 515) 448
Holmes v. Parker	(1 Scam. R. 567) 471
Hoxey v. The County of Macoupin	(2 Scam. R. 36) 508
Hubbard v. Freer	(1 Scam. R. 467) 421
Same v. Harris	(2 Scam. R. 279) 575
Same v. Hobson	(Bre. R. 147) 91
Huginin v. Nicholson	(1 Scam. R. 575) 477
Hull v. Blaisdell	(1 Scam. R. 332) 345
Humphrey v. Collier	(1 Scam. R. 47) 210
Same v. Same	(Bre. R. 231) 147
Hunter v. Sherman	(2 Scam. R. 539) 668
Same v. Gilham	(Bre. R. 54) 37
Same v. The People	(1 Scam. R. 453) 413
Same v. Ladd	(1 Scam. R. 551) 464
Hurley v. March	(1 Scam. R. 329) 343
Hutson v. Overturf	(1 Scam. R. 170) 280

TABLE OF CASES.

xi

I

PAGE

Illinois and Michigan Canal <i>v.</i> Calhoun.....	(1 Scam. R. 521)	451
Ingalls <i>v.</i> Allen.....	(Bre. R. 233)	147
Irvin <i>v.</i> Wright.....	* (1 Scam. R. 135)	264
Israel <i>v.</i> Jacksonville.....	(1 Scam. R. 290)	322

J

Jackson <i>v.</i> Haskell	(2 Scam. R. 565)	680
Same <i>v.</i> The People	(2 Scam. R. 231)	553
James <i>v.</i> Hughill	(2 Scam. R. 361)	615
Same <i>v.</i> Dunlap	(2 Scam. R. 481)	650
Johnson <i>v.</i> Acklep	(Bre. R. 59)	41
Same <i>v.</i> The People.....	(Bre. R. 276)	173
Same <i>v.</i> Moulton.....	(1 Scam. R. 532)	458
Jones <i>v.</i> Bramblet	(1 Scam. R. 276)	318
Same <i>v.</i> Bank of Illinois	(Bre. R. 86)	48
Same <i>v.</i> Lloyd.....	(Bre. R. 174)	105
Same <i>v.</i> Sprague.....	(2 Scam. R. 55)	519
Same <i>v.</i> The People	(2 Scam. R. 477)	649

K

Kerr <i>v.</i> Whiteside	(Bre. App. 6).....	187
Kettelle <i>v.</i> Wardell	(1 Scam. R. 592)	486
Key <i>v.</i> Collins.....	* (1 Scam. R. 403)	396
Kimball <i>v.</i> Kent	(2 Scam. R. 217)	545
Kimmell <i>v.</i> Schultz.....	(Bre. R. 128)	80
Same <i>v.</i> Schwartz	(Bre. R. 216)	138
King <i>v.</i> Dale	(1 Scam. R. 513)	446
Same <i>v.</i> Jacksonville	(2 Scam. R. 305)	591
Kinman <i>v.</i> Bennett	(1 Scam. R. 326)	342
Kinney <i>v.</i> Hudnut.....	(2 Scam. R. 472)	647
Kinzie <i>v.</i> Chicago.....	(2 Scam. R. 187)	535
Same <i>v.</i> Penrose.....	(2 Scam. R. 515)	659
Kirkland <i>v.</i> Lott.....	(2 Scam. R. 13)	494
Kitchell <i>v.</i> Bratton.....	(1 Scam. R. 300)	327
Kyle <i>v.</i> Thompson	(2 Scam. R. 432)	626

L

Lafayette Bank of Cincinnati <i>v.</i> Stone	(1 Scam. R. 424)	401
Lampsett <i>v.</i> Whitney	(2 Scam. R. 441)	632
Lansing <i>v.</i> Birge.....	(2 Scam. R. 375)	622
Latham <i>v.</i> Darling	(1 Scam. R. 203)	291
Lattin <i>v.</i> Smith	(Bre. R. 284)	179
Lawrence <i>v.</i> The People.....	(1 Scam. R. 414)	400
Same <i>v.</i> Yeatman	(2 Scam. R. 15)	496
Lea <i>v.</i> Vail	(2 Scam. R. 473)	648
Lee <i>v.</i> Bates	(1 Scam. R. 528)	456
Leggett <i>v.</i> Chrisman	(2 Scam. R. 46)	514

	PAGE
Leidig v. Rawson	(1 Scam. R. 272) 317
Leigh v. Mason	(1 Scam. R. 249) 309
Lincoln v. Cook	(2 Scam. R. 61) 524
Linn v. Buckingham	(1 Scam. R. 451) 418
Same v. State Bank	(1 Scam. R. 87) 235
Little v. Carlisle	(2 Scam. R. 375) 622
Littleton v. Moses	(Bre. App. 9) 188
Longley v. Norvall	(1 Scam. R. 389) 390
Lovett v. Noble	(1 Scam. R. 185) 285
Lowry v. Bryant	(2 Scam. R. 2) 488
Lurton v. Gilham	(1 Scam. R. 577) 477
Lusk v. Cook	(Bre. R. 53) 38
Lyon v. Barney	(1 Scam. R. 387) 390

M

Madison Co. v. Bartlett	(1 Scam. R. 67) 221
Manlove v. Bruner	(1 Scam. R. 390) 392
Manning v. Pierce	(2 Scam. R. 4) 489
Marshall v. Maury	(1 Scam. R. 231) 299
Marston v. Wilcox	(1 Scam. R. 60) 218
Same v. Same	(1 Scam. R. 270) 317
Mason v. Finch	(1 Scam. R. 495) 437
Same v. Same	(2 Scam. R. 223) 549
Same v. Buckmaster	(Bre. R. 9) 8
Same v. Eakle	(Bre. R. 52) 37
Same v. State Bank	(Bre. R. 141) 87
Same v. Wash	(Bre. R. 16) 15
Mastin v. Toncray	(2 Scam. R. 216) 545
Maurer v. Derrick	(Bre. R. 153) 96
Maxy v. Padfield	(1 Scam. R. 590) 484
Mayo v. Chenoweth	(Bre. R. 155) 97
Same v. Swailes	(2 Scam. R. 571) 684
Same v. Shields	(1 Scam. R. 582) 481
Same v. Thomas	(2 Scam. R. 313) 596
Same v. Wilcox	(1 Scam. R. 344) 350
McFarland v. Lewis	(2 Scam. R. 344) 612
McHatton v. The People	(2 Scam. R. 566) 680
McHenry v. Ridgeley	(2 Scam. R. 309) 593
McKee v. Brandon	(2 Scam. R. 339) 611
McKinley v. Braden	(1 Scam. R. 64) 220
McKinney v. Finch	(1 Scam. R. 152) 268
Same v. May	(1 Scam. R. 534) 459
McKinstry v. Pennoyer	(1 Scam. R. 319) 338
McLean v. Emerson	(Bre. R. 250) 161
Mears v. Morrison	(Bre. R. 172) 104
Mellich v. De Seelhorst	(Bre. R. 171) 103
Menard v. Marks	(1 Scam. R. 25) 197
Merriweather v. Gregory	(2 Scam. R. 50) 516
Same v. Smith	(2 Scam. R. 30) 503
Miller v. Howell	(1 Scam. R. 499) 439
Same v. Howke	(1 Scam. R. 501) 440

TABLE OF CASES.

xiii

	PAGE
Miller v. Bledsoe	(1 Scam. R. 530) 456
Same v. The People	(2 Scam. R. 233) 554
Mills v. Brown	(2 Scam. R. 548) 672
Mitchell v. State Bank of Illinois	(1 Scam. R. 526) 454
Mitcheltree v. Stewart	(2 Scam. R. 17) 496
Same v. Sparks	(1 Scam. R. 122) 258
Same v. Same	(1 Scam. R. 198) 289
Moffet v. Clements	(1 Scam. R. 384) 387
Moore v. Watts	(Bre. R. 18) 17
More v. Bagley	(Bre. R. 60) 41
Moreland v. State Bank	(Bre. R. 203) 126
Morgan v. Hays	(Bre. R. 88) 42
Morris v. Grover	(2 Scam. R. 528) 665
Morrison v. Primm	(Bre. R. 33) 24
Same v. Rogers	(2 Scam. R. 317) 598
Morton v. Bailey	(1 Scam. R. 213) 298
Same v. Gateley	(1 Scam. R. 211) 297
Mulford v. Shepard	(1 Scam. R. 533) 482
Murry v. Crocker	(1 Scam. R. 212) 297
Myers v. Aikman	(2 Scam. R. 452) 640

N

Nance v. Howard	(Bre. R. 183) 112
Naught v. Oneal	(Bre. App. 29) 196
Nixon v. The People	(2 Scam. R. 267) 569
Noble v. Same	(Bre. R. 28) 23
Nomaque v. Same	(Bre. R. 109) 62
Nowlin v. Bloom	(Bre. R. 98) 53
Nye v. Wright	(2 Scam. R. 222) 548

O

Ogden v. Brown	(2 Scam. R. 33) 506
Ogle v. Coffey	(1 Scam. R. 239) 303
Olney v. Myers	(2 Scam. R. 311) 595
Owen v. Bond	(Bre. R. 90) 50
Owens v. Derby	(2 Scam. R. 26) 502

P

Pankey v. Mitchell	(Bre. R. 301) 183
Same v. The People	(1 Scam. R. 80) 228
Pearce v. Swan	(1 Scam. R. 266) 316
Pearsons v. Bailey	(1 Scam. R. 507) 444
Same v. Hamilton	(1 Scam. R. 415) 400
Same v. Lee	(1 Scam. R. 193) 287
Peck v. Bogges	(1 Scam. R. 281) 321
People v. Auditor	(1 Scam. R. 537) 461
Same v. Cloud	(2 Scam. R. 362) 616
Same v. Dill	(1 Scam. R. 257) 311

<i>People v. Fletcher</i>	(2 Scam. R. 482)	660
<i>Same v. Forquer</i>	(Bre. R. 68)	46
<i>Same v. Hallett</i>	(2 Scam. R. 566)	680
<i>Same v. Lamborn</i>	(1 Scam. R. 123)	258
<i>Same v. McHatton</i>	(2 Scam. R. 566)	680
<i>Same v. Miller</i>	(1 Scam. R. 85)	231
<i>Same v. Mobley</i>	(1 Scam. R. 215)	298
<i>Same v. Needles</i>	(2 Scam. R. 361)	615
<i>Same v. Pearson</i>	(2 Scam. R. 189)	537
<i>Same v. Same</i>	(1 Scam. R. 458)	416
<i>Same v. Same</i>	(1 Scam. R. 473)	423
<i>Same v. Rockwell</i>	(2 Scam. R. 3)	489
<i>Same v. Royal</i>	(1 Scam. R. 557)	466
<i>Same v. Slayton</i>	(Bre. R. 257)	164
<i>Same v. Taylor</i>	(1 Scam. R. 202)	291
<i>Same v. The Auditor</i>	(2 Scam. R. 567)	681
<i>Peyton v. Tappen</i>	(1 Scam. R. 388)	390
<i>Phelps v. Young</i>	(1 Scam. R. 255)	163
<i>Phillips v. Dana</i>	(1 Scam. R. 498)	439
<i>Phoebe v. Jay</i>	(1 Scam. R. 207)	129
<i>Pickering v. Orange</i>	(1 Scam. R. 493)	436
<i>Same v. Same</i>	(1 Scam. R. 338)	348
<i>Piggott v. Ramey</i>	(1 Scam. R. 145)	268
<i>Pinckard v. The People</i>	(1 Scam. R. 187)	286
<i>Poole v. Vanlandingham</i>	(Bre. R. 22)	20
<i>Prevo v. Lathrop</i>	(1 Scam. R. 305)	329
<i>Prince v. Lamb</i>	(Bre. R. 298)	182
<i>Purkett v. Gregory</i>	(2 Scam. R. 44)	512

Q

<i>Quigley v. The People</i>	(2 Scam. R. 301)	590
------------------------------------	------------------------	-----

R

<i>Rager v. Tilford</i>	(Bre. App. 21)	195
<i>Randolph County v. Jones</i>	(Bre. R. 103)	57
<i>Rankin v. Beaird</i>	(Bre. R. 123)	75
<i>Ransom v. Jones</i>	(1 Scam. R. 291)	323
<i>Raplee v. Morgan</i>	(2 Scam. R. 561)	677
<i>Reavis v. Reavis</i>	(1 Scam. R. 242)	304
<i>Reed v. Hobbs</i>	(2 Scam. R. 297)	589
<i>Reynolds v. Hall</i>	(1 Scam. R. 35)	201
<i>Same v. Mitchell</i>	(Bre. R. 135)	84
<i>Richardson v. Prevo</i>	(Bre. R. 167)	102
<i>Rider v. Alleyne</i>	(2 Scam. R. 474)	648
<i>Riggs v. Dickinson</i>	(2 Scam. R. 437)	629
<i>Robertt v. Garen</i>	(1 Scam. R. 396)	394
<i>Robinson v. Burkell</i>	(2 Scam. R. 278)	575
<i>Same v. Harlan</i>	(1 Scam. R. 237)	301
<i>Same v. Rowan</i>	(2 Scam. R. 499)	654
<i>Rollette v. Parker</i>	(Bre. R. 275)	172

TABLE OF CASES.

xv

	PAGE
Ross v. Reddick	(1 Scam. R. 73) 226
Rountree v. Stuart	(Bre. R. 43) 31
Russel v. Martin	(2 Scam. R. 492) 653
Russell v. Hamilton	(2 Scam. R. 56) 520
Same v. Hogan	(1 Scam. R. 552) 465
Same v. Hugunin	(1 Scam. R. 562) 467
Rush v. Frothingham	(Bre. R. 258) 164
Ryan v. Eads	(Bre. R. 168) 102

S

Salisbury v. Gillett	(2 Scam. R. 290) 585
Sands v. Delap	(1 Scam. R. 168) 279
Saunders v. O'Briant	(2 Scam. R. 369) 618
Savage v. Berry	(2 Scam. R. 545) 671
Sawyer v. Stephenson	(Bre. R. 6) 5
Scammon v. Cline	(2 Scam. R. 456) 641
Schooner Constitution v. Woodworth	(1 Scam. R. 511) 445
Scott v. Cromwell	(Bre. R. 7) 6
Same v. Thomas	(1 Scam. R. 58) 217
Same v. Locke	(Bre. App. 5) 187
Seward v. Wilson	(1 Scam. R. 192) 286
Sheldon v. Reihle	(1 Scam. R. 519) 450
Shepard v. Ogden	(2 Scam. R. 257) 567
Shirtliff v. The People	(2 Scam. R. 7) 491
Simpson v. Rawlings	(1 Scam. R. 28) 199
Same v. Updegraff	(1 Scam. R. 594) 487
Sims v. Klein	(Bre. R. 234) 148
Same v. Same	(Bre. R. 292) 181
Same v. Hugsby	(Bre. App. 27) 196
Slocumb v. Kuykendall	(1 Scam. R. 189) 286
Sloo v. State Bank of Illinois	(1 Scam. R. 428) 403
Smith v. Bridges	(Bre. R. 2) 2
Same v. Finch	(2 Scam. R. 321) 599
Same v. Hileman	(1 Scam. R. 323) 340
Same v. Shultz	(1 Scam. R. 490) 434
Snyder v. Laframboise	(Bre. R. 268) 166
Same v. Bank of Illinois	(Bre. R. 122) 74
Spragins v. Houghton	(2 Scam. R. 211) 544
Same v. Same	(2 Scam. R. 377) 623
Stacker v. Wood	(1 Scam. R. 207) 294
Stacy v. Baker	(1 Scam. R. 417) 400
State v. Evans	(2 Scam. R. 208) 542
Same v. Wilson	(2 Scam. R. 225) 549
State Bank v. Brown	(1 Scam. R. 106) 249
Same v. Buckmaster	(Bre. R. 133) 83
Same v. Hawley	(1 Scam. R. 580) 479
Same v. Kain	(Bre. R. 45) 31
Same v. Moreland	(Bre. R. 220) 141
Stone v. The People	(2 Scam. R. 326) 600
Same v. Manning	(2 Scam. R. 530) 665
Stout v. McAdams	(2 Scam. R. 67) 528

	PAGE
Street v. Blue	(Bre. R. 201) 125
Same v. Co. Comm. of Gallatin	(Bre. R. 25) 22
Stringer v. Smith	(1 Scam. R. 295) 323
Swafford v. Dovenor	(1 Scam. R. 165) 277
Same v. The People	(1 Scam. R. 289) 322
Swain v. Cawood	(2 Scam. R. 505) 658

T

Tarlton v. Miller	(Bre. R. 39) 28
Taylor v. Edwards	(Bre. R. 139) 86
Same v. Kennedy	(Bre. R. 58) 41
Same v. Sprinkle	(Bre. R. 1) 1
Same v. Winters	(Bre. R. 91) 50
Teague v. Wells	(Bre. R. 297) 182
Teal v. Russell	(2 Scam. R. 319) 599
Thompson v. Armstrong	(Bre. R. 23) 20
Thornton v. Bradshaw	(Bre. R. 13) 12
Same v. Davenport	(1 Scam. R. 296) 323
Same v. Heirs of Henry	(2 Scam. R. 218) 546
Tindall v. Meeker	(1 Scam. R. 137) 265
Towell v. Gatewood	(2 Scam. R. 22) 500
Townsend v. Briggs	(1 Scam. R. 472) 423
Same v. Griggs	(2 Scam. R. 365) 617
Trader v. McKee	(1 Scam. R. 558) 467
Tufts v. Rice	(Bre. App. 30) 196
Turney v. Goodman	(1 Scam. R. 184) 285
Tyler v. The People	(Bre. R. 227) 145
Same v. Young	(2 Scam. R. 444) 635

V

Vance v. Funk	(2 Scam. R. 263) 568
Vandyke v. Daley	(2 Scam. R. 564) 680
Van Horn v. Jones	(2 Scam. R. 1) 488
Vanlandingham v. Fellows	(1 Scam. R. 233) 300
Same v. Lowery	(1 Scam. R. 240) 303
Van Winkle v. Beck	(2 Scam. R. 488) 651
Vermilion (The County of) v. Knight	(1 Scam. R. 97) 241
Vernon v. May	(Bre. R. 229) 145
Vickers v. Hill	(1 Scam. R. 307) 330
Vincent v. Morrison	(Bre. R. 175) 106

W

Waldo v. Averett	(1 Scam. R. 487) 431
Same v. Williams	(2 Scam. R. 470) 647
Walker v. Walker	(2 Scam. R. 291) 585
Wallace v. Jerome	(1 Scam. R. 524) 454
Wann v. McGoon	(2 Scam. R. 74) 531

TABLE OF CASES.

xvii

	PAGE
Warnock v. Russell.....(1 Scam. R. 383)	387
Warren v. McHatton.....(2 Scam. R. 32)	505
Weatherford v. Wilson.....(2 Scam. R. 254)	567
Webb v. Sturtevant.....(1 Scam. R. 181)	284
Webster v. Vickers.....(2 Scam. R. 295)	589
Wells v. Hogan.....(Bre. R. 264)	165
Wheeler v. Shields.....(2 Scam. R. 348)	612
White v. Hight.....(1 Scam. R. 204)	291
Same v. Martin.....(2 Scam. R. 69)	530
Same v. Stafford.....(Bre. R. 38)	27
Same v. Thompson.....(Bre. R. 43)	31
Same v. Wiseman.....(1 Scam. R. 169)	280
Whiteside v. The People.....(Bre. R. 4)	3
Same v. Bartleson.....(Bre. R. 42)	30
Whitesides v. Lee.....(1 Scam. R. 548)	464
Whitney v. Cochran.....(1 Scam. R. 209)	298
Same v. Turner.....(1 Scam. R. 253)	310
Wickersham v. The People.....(1 Scam. R. 128)	263
Williams v. Claytor.....(1 Scam. R. 502)	440
Willis v. The People.....(1 Scam. R. 399)	396
Wilson v. Campbell.....(1 Scam. R. 493)	436
Same v. Greathouse.....(1 Scam. R. 174)	281
Wincher v. Shrewsbury.....(2 Scam. R. 283)	578
Woods v. Hynes.....(1 Scam. R. 103)	246
Woodworth v. Paine.....(Bre. R. 294)	
Wright v. Armstrong.....(Bre. R. 130)	
Same v. The People.....(Bre. R. 66)	

Y

Yunt v. Brown.....(1 Scam. R. 264)	314
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DECISIONS
OF THE
SUPREME COURT OF THE STATE OF ILLINOIS.

DECEMBER TERM, 1819.

PRESENT:

HON. THOMAS C. BROWNE,	}	ASSOCIATE JUSTICES.
HON. JOHN REYNOLDS,		
HON. WILLIAM WILSON,		

TAYLOR v. SPRINKLE.

Breese R., 1.

Appeal from Gallatin.

In all special pleas to the consideration of a note, bond, due bill, or other instrument of writing for the payment of money or personal property, the plea must aver the precise manner in which the consideration failed.

Per Curiam.—This was an action of covenant. The fifth plea states, that the consideration failed. This plea was demurred to, and the demurrer sustained by the court. The validity of the fifth plea is the only point before the court. The plea was filed under the statute, which introduces a new remedy contrary to the common law, and ought not to be extended too far; and in all special pleas, the manner of avoiding the obligation ought to be shown. As the precise manner is not shown by this plea, it is insufficient, and the demurrer to it was properly sustained. The judgment of the Circuit Court is affirmed, with five per cent. damages and costs.

Judgment affirmed.

Chief Justice PHILLIPS was absent during this term, and Justice BROWNE having decided the case below, did not join in the decision.

The foregoing case arose under the statute of 1819, p. 59, which gave to the obligee or payee of any written instrument for the payment of money or personal property, the right to plead a want of consideration, or a total or partial failure thereof. See also Cooke's Statutes, 292, sec. 10; *Stacker v. Hewett*, 1 Scam. R., 207; *Buckmaster v. Grundy*, *ibid.*, 810; *Swain v. Cawood*, 2 *ibid.*, 506, where the doctrine of the text is affirmed.

Smith v. Bridges.

Chipps v. Yancey.

Coleen et al. v. Figgins.

SMITH v. BRIDGES.

Breese R., 2.

Appeal from Madison.

No particular form is necessary to constitute a valid promissory note, but the instrument must, upon its face, show to whom it is payable.

Per Curiam.—The plaintiff below, states in his petition, that he “holds notes on, etc.,” and the instrument on which suit is brought, has not a single feature of a note, inasmuch as it does not appear there was any undertaking by the defendant to pay any person at all.

Although no particular form is necessary to make a note, yet the writing must show an undertaking or engagement to pay, and to a person named in it, or to bearer, or holder of the instrument. The judgment of the court below is reversed, and the cause remanded to the court below.

Judgment reversed.

Justice REYNOLDS having been counsel in this cause, in the court below, gave no opinion.
On the same point, Mayo v. Chenowith, Bre. R., 155; Walters v. Short, 5 Gilm. R., 253.

CHIPPS v. YANCEY.

Breese R., 2.

Appeal from Pope.

Nil debet to an action upon the record of a judgment rendered by the court of a sister State, is bad on demurrer.

Per Curiam.—This was an action of debt on a judgment rendered in the State of Kentucky. The defendant pleaded *nil debet* to which there was a demurrer, which the court sustained. To reverse this opinion, this appeal was taken. It is considered by the court, that the judgment of the court below, sustaining the plaintiff’s demurrer to the defendant’s plea, be affirmed with costs.

Judgment affirmed.

Justice WILSON having decided this cause in the court below, gave no opinion.
S. P., 2 Dall. R., 302; 7 Cra. R., 480; 3 John. R., 52.

COLEEN et al. v. FIGGINS.

Breese R., 3.

Appeal from Madison.

1. At common law a statute takes effect from and after its passage, when the statute itself is silent upon the subject; and the day of the date is to be excluded in computing the time. (a)
2. When a statute, passed March 31, 1819, establishes a court, and fixes the first term in the month of May

Coleen *et al.* v. Figgins.Whiteside *et al.* v. The People.

following, and the clerk of the court thus established issues a writ bearing date March 31, 1819, returnable to the May term, the writ is *void*.

3. Appearance does not cure a void writ. (*b*)
4. A void writ may be quashed on motion.

Per Curiam.—It appears from the record in this cause, that the writ issued by the Madison Circuit Court, on the 31st day of March, 1819, and made returnable to May term following, and that the act creating circuit courts, passed on the same day the writ issued. Although it appears that the act establishing circuit courts, passed on the 31st day of March, yet the court are clearly of opinion, that it did not take effect until the first day of April, and that the process is therefore void, as the clerk had no authority to issue the writ, and make it returnable to a court not in existence, at the time the writ issued. No appearance could make the writ good. The court below was bound to have quashed it, it differing materially from the process that is voidable merely, where appearing and pleading might cure the defect.

It is unnecessary for the court to notice any other error assigned, as the point already decided determines the case. The judgment of the court is reversed.

Judgment reversed.

Kane, for appellant.

Winchester, for appellee.

Justice REYNOLDS having decided this cause in the court below, gave no opinion.

(*a*) Since the foregoing decision, the constitution of Illinois has been amended and revised. The law now is that no *public* act shall take effect until the expiration of 60 days from the end of the session of the General Assembly at which the same was enacted; *unless* in cases of emergency the legislature shall otherwise determine. *Vide* Const. of April 1, 1848, Art. 3, sec. 23.

The text is supported by *Goodsell et al. v. Boynton et al.*, 1 Scam. R., 565.

(*b*) *Contra*, *Easton v. Altum*, 1 Scam. R., 250.

WHITESIDE *et al.* v. THE PEOPLE.

Breese R., 4.

Error to Pope.

1. In averring time in an indictment, the year must be stated to be "*the year of our Lord*."
2. All criminal proceedings must run in the name, and be instituted by the authority of the People of the State. (*a*)
3. In indictments for riot, the facts which constitute the riot should be clearly set forth. It is not sufficient to state that the defendants made "a great noise and disturbed the peace." (*b*)

Per Curiam.—This was a criminal prosecution for a riot, against the plaintiffs in error. Three errors are assigned.

1. Uncertainty in the indictment, in not averring the year to be the year of our Lord.

2. The form prescribed by the constitution, in which criminal prosecutions shall be commenced, is not pursued.

3. There is not such a criminal offence alleged in the indictment, as will make the plaintiffs in error guilty of a riot, if committed.

On the first point, the law makes it necessary to have common certainty in every indictment, and nothing can be inferred to aid it. Without inference, the year could not be gathered from the indictment, and therefore it is defective. On the second point, when a constitution or act of the legislature, prescribes a certain form to be used in legal proceedings, it would seem that the court has no power to dispense with that form. Therefore, as the indictment does not pursue the form given in the constitution, that all indictments shall be carried on, "in the name, and by the authority of the people of the State of Illinois," it is bad.

On the third point, the charge in the indictment is, that the defendants made a great noise and disturbance of the peace. This, the court considers too vague and uncertain. In criminal proceedings, the charge should be distinct and positive, and the way and manner, in which the great noise and disturbance of the peace was made, should have been stated. For this omission, the indictment is also defective.

Judgment reversed.

(a) S. P. Donnelly v. People, 11 Ill. R., 562; Wight v. People, 15 Ill. R., 417.

(b) S. P. Dougherty v. People, 4 Scam. R., 180.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN JULY TERM, 1820.

PRESENT :

JOSEPH PHILLIPS, CHIEF JUSTICE.	
JOHN REYNOLDS,	}
THOMAS C. BROWNE,	
	ASSOCIATE JUSTICES.

CORNELIUS *v.* VANORSBALL.

Breese R., 5.

Error to St. Clair.

A plea of failure of consideration must show wherein the failure consists.

Per Curiam.—In this case there was a plea alleging a failure of consideration, to which there was a demurrer. The demurrer having been sustained by the court below, this writ of error is prosecuted, to reverse that judgment. It is considered by the court, on the authority of the case of *Taylor v. Sprinkle*, decided at the last term, that the judgment of the court below be affirmed.

Judgment affirmed.



SAWYER *v.* STEPHENSON.

Breese R., 6.

Error to Madison.

1. The granting of a new trial is discretionary, and cannot be assigned for error. (*a*)
2. The affidavit of a juryman may in certain cases be relied upon to impeach a verdict. (*b*)
3. After a jury has retired from the bar, if they, without the consent of the court, recall a witness, their verdict will be set aside, and this fact may be established by the affidavit of one of the jurors.

THE facts in the case were, that on a motion for a new trial in the court below, the defendant offered the affidavit of one of the jurors

Sawyer v. Stephenson.

Scott v. Cromwell.

who tried the cause, setting forth, that one of the jurors, who was sworn as a witness in the cause, gave in the jury-room, new, other and additional testimony, by reason of which, deponent was induced to give a verdict for the plaintiff, when, if it had not been for such testimony, so given by one of their own body, he, deponent, would have found a verdict for the defendant. The court granted the defendant a new trial. To reverse which opinion, a writ of error was prosecuted.

Per Curiam.—Granting new trials, rests in the sound discretion of the court before which the trial is had, and as a general rule, a refusal to grant a new trial, should not be considered as error; unless it appears manifest that justice is rendered thereby more precarious.

The first question for consideration is, would the facts disclosed by the affidavit have justified the court in awarding a new trial, if they had been sworn to by a person not of the jury? We are satisfied they would, and although new trials should be granted very cautiously for irregular and improper conduct on the part of the jurors in their retirement, when such misconduct is disclosed by an affidavit made by one of the body; yet being fully satisfied of the truth of the facts disclosed in this manner, as also that the juror has not been tampered with, and improperly influenced to swear falsely, and that no such verdict would have been found, if the jury had not listened to such improper testimony, the court would be as much bound to award a new trial on such affidavit, as if the truth of the facts therein contained had been disclosed by one not of the jury. The court, therefore, not being able to discover that the case under consideration is at variance with the principles here laid down, are of opinion, that the court below acted correctly in awarding a new trial on that affidavit, and the judgment must be affirmed.

Judgment affirmed.

(a) S. P., *Clemson v. Kruper*, Bre. R., 162; *Street v. Blue*, *ibid.*, 201; *Adams v. Smith*, *ibid.*, 221; *Vernon v. May*, *ibid.*, 229; *Littleton v. Moses*, Bre. App., 9; *Harrison v. Clark*, 1 Scam. R., 181; *Collins v. Claypole*, Bre. R., 164.

But by statute, the overruling of a motion for a new trial may be assigned as error. *Cooke's Stat.*, 264, sec. 23; *Smith v. Schultz*, 1 Scam. R., 491.

(b) But confessions of a jurymen sworn to by a party are inadmissible. *Forrester v. Gaurd*, Bre. R., 44.

SCOTT v. CROMWELL.

Breese R., 7.

Appeal from Monroe.

Where the defendant specially demurs to a declaration, and is sustained by the court, he is not entitled to a continuance. (a)

Scott v. Cromwell.

Beaumont v. Yantz.

THE defendant in the court below, the appellant here, demurred specially to the plaintiff's declaration, for informalities therein. The court sustained the demurrer, and gave plaintiff leave to amend, whereupon the defendant moved the court for a continuance, which motion the court overruled. To reverse this opinion this appeal was taken.

Per Curiam.—Where the plaintiff amends in matters of form only, the defendant is not, for that reason, and as a matter of course, entitled to a continuance. He has, however, the right to plead *de novo*.

Judgment affirmed.

(a) S. P., Breese R., 87; 2 Scam. R., 498. But where the amendment is substantial, and arises upon a general demurrer, a continuance will be granted. *Hawks v. Lands*, 3 Gilm. R., 227; *Illinois Marine and Fire Insurance Company v. Marsalles Manufacturing Company*, 1 Gilm. R., 236; *Covell v. Marks*, 1 Scam. R., 525; S. P., *Webb v. Lasater*, 4 Scam. R., 548; Breese R., 48.



BEAUMONT v. YANTZ.

Breese R., 8.

Appeal from Monroe.

1. In trespass *de bonis asportatis*, this description of the property is sufficient—viz.: "*Four horses, the property of the plaintiff, of the value of \$200.*"
2. It is unnecessary to specify the value of each horse.

THIS was an action of trespass *de bonis asportatis*, brought by Yantz against Beaumont, in the court below, for taking and conveying away "four horses, the property, goods, and chattels of the plaintiff, of the value of three hundred dollars." The defendant demurred to the declaration, and assigned as causes of demurrer: 1, That the horses were not described with sufficient particularity; and 2, That the value of each horse should have been stated in the declaration. The demurrer was overruled, and an appeal taken to this court.

Per Curiam.—The cases cited by the appellant's counsel do not apply to this case. It is not necessary that each horse should be particularly described. Mentioning the number of horses, and an allegation that they were the property of the plaintiff, is sufficient. There is no precedent to be found in the books, in which the property is precisely described, as to its shape, color, etc. A recovery in this action could well be pleaded in bar of a suit, for four black geldings, unless the plaintiff should new assign, and show them to be other and different ones from those for which this suit is brought.

As to the second objection, it is sufficient that the aggregate value

Beaumont v. Yantz.

Mason v. Buckmaster.

of all the horses be set forth in the declaration. The judgment of the court below is affirmed.

Judgment affirmed.

MASON v. BUCKMASTER.

Breese R., 9.

Error to Madison.

1. Profert of unsealed writings is unnecessary in pleadings.
2. But oyer is demandable of them.
3. When an assignee declares upon a promissory note against the maker, he need not aver a consideration for the assignment.

THIS was an action of assumpsit brought by Buckmaster, on a promissory note executed by James Mason to Paris Mason, and by him assigned to Buckmaster. Two objections were made by defendant in the court below, to the plaintiff's declaration: 1, That there was no *profert* made of the note declared on; and 2, There was no consideration averred or stated. The court overruled these objections, and gave judgment for the plaintiff, to reverse which the defendant sued out a writ of error, and assigned the same objections as grounds of error.

Per Curiam.—It is necessary, by the common law, to make *profert* of writings under seal, so as to place them in the power of the court, to give the opposite party oyer if required, and to let the court see if the deed is fair and honest on view. From the statute, it is necessary for the party to have oyer of writings not under seal, on which suit is brought, as he is bound to deny the execution of them, under the plea of *non est factum*, under oath. A copy of the writing on which suit is brought, must be filed with the declaration, and the court can, upon a plea of oyer, compel the production of the original, so that no inconvenience can arise from the want of *profert*. There is no error, then, on this point.

As to the second point, the court believe it is never necessary to state a consideration in a case on an assigned note, between the maker and the assignee. The judgment of the court below is affirmed. (a)

Judgment affirmed.

(a) This case turns upon the statute (Cooke's Stat., 254, sec. 18), which provides that no person shall be permitted to deny the execution of any written instrument, upon which an action is brought, or upon which a set-off is based, or which is set up as a defence, or is mentioned in any of the pleadings subsequent to the declaration, unless the plea which questions its authenticity is verified by the affidavit of the party who denies its existence.

Cox v. McFerron.

COX v. McFERRON.

Breese R., 10.

Appeal from Randolph.

In *scire facias*, to foreclose a mortgage under the Illinois Statute, a return of *nihil* upon an *original* and an *alias* writ is equivalent to a personal service. (a)

THIS was an action commenced by *scire facias* in the Randolph Circuit Court, by McFerron against Cox, to foreclose a mortgage executed by the latter to the former. There were two *nihil*s returned, upon which the court on motion gave judgment for McFerron. The point made was, whether the return of two *nihil*s on a *sci. fa.* was equivalent to the actual service of process, when the defendant can be personally served.

Per Curiam.—It appears, that by the common law, all writs of *scire facias* were proceeded on in the same manner by the return of two *nihil*s; this was discretionary with the party issuing the process. Our statute gives this writ to the mortgagee, and, no doubt, in giving a writ, all the attributes that belonged to it at common law were given also. It is to have a common law operation, and possess the common law incidents.

We are of opinion that the return of two *nihil*s is equivalent to a service, and authorized the court to render judgment as in cases where there has been an actual service. The judgment is therefore affirmed.

Judgment affirmed.

(a) The statute upon which this decision is based will be found in Cooke's Stat. 976, sec. 28.
This decision affirmed, *McCourtie v. Davis*, 2 Gilm. R., 306.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1820.

PRESENT :

JOSEPH PHILLIPS, CHIEF JUSTICE.
JOHN REYNOLDS,
THOMAS C. BROWNE, } ASSOCIATE JUSTICES.
WILLIAM WILSON, }

BLAIR v. SHARP.

Breese R., 11.

Error to Washington.

The words, "*he swore to a lie*," in a declaration for slander, are not actionable without a *colloquium*, setting forth the circumstances under which the words were spoken by the defendant. (a)

THIS was an action of slander brought in the Washington Circuit Court by Blair and wife against Sharp. From the agreed case, it appears, that the only words, charged in the declaration, to have been spoken of the plaintiff by the defendant, were, that the plaintiff "had sworn a lie." There was no colloquium showing how, or on what occasion the lie was sworn. The court below declared the declaration insufficient, and that the words, as stated, were not actionable. To reverse that judgment, a writ of error was sued out by plaintiff.

Per Curiam.—The omission of a colloquium, showing to what the words spoken referred, so as to render them actionable, we consider fatal. The declaration is not good at common law, nor under the statute. The declaration does not bring the case within the letter or meaning of the statute. The judgment of the court below is affirmed, with costs.

Judgment affirmed.

(a) The statute above alluded to provides in substance, that words which, in their common acceptation, impute perjury to the plaintiff, are actionable, whether spoken in relation to a judicial proceeding or not. Cooke's Stat., 1137, sec. 2; *Vide* Sandford v. Gaddis, 13 Ill. R., 329.

French v. Creath.

Cornelius v. Boucher.

FRENCH v. CREATH.

Breese R., 12.

Appeal from Randolph.

1. An order of court appointing a *prochein ami* for an infant plaintiff, if necessary, must be made in the first instance. (a)
2. An action for slander, imputing a crime to the plaintiff, will lie, notwithstanding the repeal of the statute creating the offence charged.
3. *Semble*, It is slanderous even to charge one with a crime, though committed in a sister State or foreign country.

JOHN R. CREATH, an infant under the age of twenty-one years, by George Creath, his father and next friend, brought an action, in the Circuit Court of Jackson, and removed by change of venue to Randolph, against Joseph French, for slander. On the trial a verdict was found for plaintiff, and a motion made by defendant for a new trial, and in arrest of judgment, which were overruled, and an appeal taken to this court where it was assigned for error: 1, That there was no order of the court below, appointing the next friend of the infant plaintiff; and 2, That the slanderous words spoken, charged the plaintiff with the commission of the crime in 1815, and as the law creating the offence with which he was charged is repealed, no words spoken in relation to that crime are actionable.

Per Curiam.—We are of opinion, that the judgment of the court below ought to be affirmed. It is now too late to make the objection first stated, and as to the second, there is no clearer principle that the action is not barred, because the statute creating the offence has been repealed. If the words spoken, had charged an offence to have been committed in another State, which is not punishable here, still they would be actionable.

*Judgment affirmed.**Henry Starr*, for appellant.*Elias Kent Kane*, for appellee.

(a) The statute requires no order, but expressly permits the suit, upon the single condition that the *next friend* gives bond for costs. Cooke's Stat., 552, sec. 18; *vide* also Hoare v. Harris, 11 Ill. R., 24; McClay v. Norris, 4 Gilm. R., 870; Holmes v. Field, 12 Ill. R., 424.

CORNELIUS v. BOUCHER.

Breese R., 12.

Error to St. Clair.

1. The granting a new trial cannot be assigned for error. (a)
2. Nor can the granting of a continuance.
3. The mode of swearing a jury is a matter of form, and is waived if not made in the first instance.

Cornelius v. Boucher.

Thornton v. Bradshaw.

THIS was an action of covenant, brought in the St. Clair Circuit Court, by Cornelius against Boucher; on the trial a verdict was found for the defendant, and a motion made by plaintiff for a new trial, which was overruled, and judgment entered on the verdict, for the defendant. To reverse this judgment the plaintiff prosecuted this writ of error, and assigns for error: 1, That the affidavit of the defendant for a continuance, at the July term, 1818, was not sufficient to authorize a continuance; 2, That there were three issues of fact made up, and the jury were sworn to try but one issue, and it does not appear, upon which they found their verdict; and 3, That the court erred in not granting a new trial on the affidavit of the plaintiff.

Per Curiam.—On the first point, there is no case within the recollection of the court, in which it has been considered error to grant a continuance. The third objection will depend very much upon the same principle, that granting continuances and new trials is so much a matter of discretion, that an appellate court cannot undertake to inquire into the proper exercise of that discretion, in a case like the present. The court, however, must not be understood as saying, that in no case would it make the inquiry. If a case was brought up, upon bill of exceptions containing all the facts, it would furnish this court with the means of forming an opinion, as to the proper exercise or abuse of the discretion of the court below.

The second error assigned, is considered equally untenable. The swearing the jury is matter of form, and if not objected to at the time, an irregularity in the manner of swearing them cannot afterward be assigned as error. There is no judgment of the court upon the point, and the jury is presumed to take into consideration the whole matter, and if their intention is manifest, the court will set right mere matters of form. The cases of *Thompson v. Button*, 14 Johns. Rep., 84; and *Hawks v. Crofton*, 2d Burrow, 698, are authorities in support of this opinion. The judgment of the court below is affirmed.

Judgment affirmed.

(a) *Vide* *Sawyer v. Stephenson*, *ante*, p. 9.

THORNTON v. BRADSHAW.

Breese R., 13.

Appeal from Union.

1. An administrator has no power to loan the funds of the estate.
2. If one of several administrators loans the money of his intestate, he alone is responsible for its loss, and may sue alone to recover it back. (a)

Thornton v. Bradshaw.

Brazzle et al. v. Usher.

SMILEY and Bradshaw, executed their note to Hezekiah West, as administrator of the estate of Weaver, deceased, for a sum of money, to recover which, this action was brought, in the name of said West and John Thornton and Mary his wife, late Mary Weaver, who were joined with West, in the administration on the estate of Weaver. The money was loaned by West alone, to Smiley and Bradshaw, and the note executed to him alone as administrator. An objection was made by defendants to the improper joinder of parties, which the court sustained, and gave judgment for the defendants. To reverse which, the plaintiffs appealed.

Per Curiam.—The court knows of no power in the administrator, by virtue of the trust conferred on him by law, to loan the money belonging to the estate; if he does it, he acts upon his own responsibility, and renders himself liable to the estate. The note was made to West alone, and for that reason, the suit should have been commenced in his name, and a joinder of his co-administrators was improper, as no right of action, to recover the amount of the note, existed in them. Without determining any other question, for this ground alone, the court affirms the judgment.

Judgment affirmed.

(a) Power of one of several administrators, *Dwight v. Newell*, 15 Ill. R., 335.

BRAZZLE et al v. USHER.

Breese R., 14.

Error to Gallatin.

If the parties to an action go to trial without a plea, the verdict will cure the defect under the statute of *Jeofails*.

USHER brought an action of trespass *vi et armis*, against Brazzle and Hawkins, in the Gallatin Circuit Court, and recovered a verdict and judgment against them. To reverse which judgment, they sued out a writ of error, and assigned for error that there was no plea filed in the cause, and that a trial was had without a plea. It appears from the record that the parties, by their attorneys, were present at the trial, and made no objections to the proceedings as they were.

Per Curiam.—The appearance of the parties cured the defect, if any, arising from the failure to file a plea. The statute of amendments will apply in this case to cure the irregularity. The judgment of the court below must be affirmed.

Judgment affirmed.

The statute of amendments and *Jeofails*, referred to, will be found in Cooke's Stat., 249.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF ILLINOIS,
IN DECEMBER TERM, 1822.

PRESENT :

THOMAS REYNOLDS, CHIEF JUSTICE.

THOMAS C. BROWNE,
JOHN REYNOLDS,
WILLIAM WILSON, } ASSOCIATE JUSTICES.

CORNELIUS v. COONS, *et al.*

Breese R., 15.

Appeal from St. Clair.

By consent of record, an appeal will lie from an interlocutory order of the inferior court dissolving an injunction. (*a*)

CORNELIUS exhibited his bill in chancery, in the St. Clair Circuit Court, praying an injunction to enjoin Coons from the collection of certain judgments which he had obtained against Cornelius, before Clayton Tiffin, a justice of the peace, and also to enjoin Jarvis, the constable, from collecting the executions issued upon those judgments. An injunction was awarded by the judge in vacation. Jarvis answered, setting forth his powers to act as constable, by virtue of the executions. Coons answered, and denied every material allegation in the complainant's bill. Upon a hearing of the cause upon bill and answers, the court dissolved the injunction. The errors assigned question the correctness of the court below in dissolving the injunction, and in rendering that judgment in vacation.

REYNOLDS, C. J.—It is a sufficient answer to the second error assigned, that the judgment of the court, and this appeal, were both had by consent entered of record. Without such consent, no appeal would lie upon an order dissolving an injunction, it being an interlocutory, and not a final judgment. The correctness of the judgment

Cornelius v. Coons *et. al.*

Mason v. Wash.

in dissolving the injunction cannot be questioned. If the bill contained any equity, it is completely destroyed by the defendant's answer. The judgment of the court below is affirmed. (a)

Judgment affirmed.

(a) *Contra.* Where no consent is given. Young v. Grundy, 6 Cra. R., 51.

MASON v. WASH.

Breese R., 16.

Appeal from Madison.

1. The Illinois statute, making notes assignable, varies in its provisions and objects from the statute of Anne, and must be construed differently.
2. Under our statute, diligence by suit must be used by indorsee, in order to charge the maker and prior indorsers, where a suit would be availing.
3. If the *lex loci* of a sister State is relied upon to take the case out of the operation of our law, it must be pleaded and proved in our courts.
4. A discharge of the indorser of a promissory note, under laws of a sister State where his indorsement was made, is no bar to a suit in our courts.

THIS action was commenced against the defendant below, who is plaintiff here, upon his liability as assigner of a promissory note. The declaration averred that the note was executed by S. S. and C. Porter, at New York, and made payable six months after the date thereof, to James Mason or order. That on the day of the execution of the note, and before its payment, James Mason, at New York, assigned the note to Robert Wash; that on the day the note fell due, and was payable, it was presented at New York to the makers for payment, and that payment by them was refused, of which the assignor, Mason, had notice. To this declaration the defendant demurred, which the court overruled. The defendant then plead, among other pleas, his discharge under the bankrupt laws of New York, to which the plaintiff demurred, and which demurrer the court sustained. A motion was also made by defendant in arrest of judgment, which the court overruled, but gave judgment for the plaintiff. To reverse which, an appeal was granted, and the appellant assigned for error among others: 1, The judgment of the court in overruling his demurrer to the declaration; 2, Overruling his motion in arrest of judgment; and 3, In sustaining the plaintiff's demurrer to the defendant's special plea of a discharge under the bankrupt laws of New York.

REYNOLDS, C. J.—In this case, the court is called upon to say, whether sufficient facts are shown in the pleadings, to authorize the plaintiff below to recover. This depends, we conceive, upon the

sound construction to be given to our act of the legislature, making promissory notes assignable. We cannot give to that act, the same construction that is given to the statute of Anne. The provisions of the two statutes are different; the statute of Anne places promissory notes upon the same footing with inland bills of exchange—ours does not. Ours makes notes for the payment of property assignable—the statute of Anne does not. That statute was passed for the furtherance of commerce, and to suit the convenience and interests of a greatly commercial people. Ours was enacted at a time when but few persons inhabited the country, and whose pursuits were domestic and agricultural. Our statute expressly declares, that the assignor shall *not* be liable, until due diligence has been used by the holder to obtain the money from the maker. To give our statute the same construction that the statute of Anne receives, would, in the opinion of the court, defeat the intention of the legislature, and the obvious understanding of the people. Hence, we are irresistibly led to conclude, that the diligence contemplated by our statute, is diligence by suit, when that course will obtain the money. No suit, then, having been commenced and prosecuted against the makers of this note, as appears from the pleadings, the declaration is insufficient, and no recovery can be had thereon under the laws of this State.

But here we are met by an argument, that the right of action accrued under the laws of New York, the contract having been made there, and that the laws of that State must furnish the rule of decision in this case. It is a sufficient answer to that argument to remark, that the laws of New York were neither pleaded, nor proved in the court below, and this court cannot, *ex officio*, take notice of the laws of a foreign State. Here we might stop; but as the question which is the foundation of the third error assigned, may again be raised in the court below, it will be best, once for all, to settle it, and in doing so, it will be useless, and accounted a vain boast of learning to enter into argument or reasoning upon the subject, it having been settled by the highest judicial tribunal known to our government. The contract in this case was made after the passage of the bankrupt law of New York, and the discharge obtained under that law. But as the Supreme Court of the United States has determined that the discharge is equally unavailing, whether the contract was made before or after the passage of the act, this court feels itself bound to yield to that opinion, how much soever some of the court might be disposed to question its correctness. We presume, however, it is founded upon the fact, that the power to pass bankrupt laws is delegated to the general government, and hence, the States are restricted.

Mason v. Wash.

Moore v. Watts.

Some other questions were raised in the argument of this cause, but as they relate principally to the sufficiency of the testimony to authorize the finding of the jury, are not of a character to require the interfering hand of this court. The judgment below must be reversed, the appellant recover his costs, and the cause remanded to the court below for new proceedings to be had, not inconsistent with this opinion.

Judgment reversed.

—♦♦—
MOORE v. WATTS.

Breese R., 18.

Error to St. Clair.

A justice of the peace cannot justify in an action of trespass for assault and battery, and false imprisonment, under a warrant for felony issued by him, based upon an affidavit charging that "*A. B. entered the inclosure of C. D., and carried off her grain,*" there being no charge of a felonious intent.

THE facts sufficiently appear in the opinion of

REYNOLDS, C. J.—This is an action of assault and battery and false imprisonment.

The defendants pleaded specially in substance, That the said Watts being a justice of the peace—that the defendant, Wells, appeared before the said justice, and made oath that the said plaintiff had entered her inclosure and carried off a quantity of her grain—that thereupon the said justice issued his warrant, upon which the plaintiff was arrested and committed. Under this proceeding the defendant justifies.

The plaintiff replied, that the assault and battery and false imprisonment was committed of the defendant's own wrong, and without any legal process, founded upon a charge of felony, sworn to before said justice. Upon this replication issue was taken. The affidavit, warrant and commitment, were read in evidence to the jury, and the court instructed the jury that they were a complete justification to the defendants. It is to this instruction the plaintiff excepts, and we are called upon to say whether it is correct. We will here remark that the plea contains an averment that the affidavit meant, that the plaintiff feloniously entered the inclosure of the said Wells, and carried off her grain. This kind of innuendo, if we may use the expression, cannot alter the sense, or extend the meaning of the words. We will now consider, does the affidavit give to the justice jurisdiction? If it does, then was the officer who acted under it,

Moore v. Watts.

Beer v. Phillips.

justified. By the 17th section of the act defining the powers and duties of justices of the peace, it is provided,

That it shall be lawful for any justice of the peace, upon oath being made before him that any person hath committed, or that there are just grounds to suspect that he or she hath committed any criminal offence within his county, to issue his warrant, etc. Can this provision be construed to extend to mere civil trespasses? we think not: and the affidavit shows nothing more. Then we must say the court erred in instructing the jury that the affidavit and proceedings under it justified the defendants. If the justice had not jurisdiction, and this is apparent, both from the affidavit and warrant, the officer who acts under his process, cannot thereby claim to be justified. Let the judgment of the court below be reversed, the plaintiff recover his costs, and the cause remanded for new proceedings to be had not inconsistent with this opinion.

Judgment reversed.

BEER v. PHILLIPS.

Breese R., 19.

Error to St. Clair

Demurrer to replication overruled; defendant rejoins and issue taken thereon; defendant waives his demurrer, and cannot assign error upon the decision overruling the demurrer.

REYNOLDS, C. J.—This was an action of trespass *quare clausum fregit*, commenced by Philips against the Beers in the court below. The defendants below pleaded not guilty, and *liberum tenementum*. Upon the first plea, issue was taken, and to the second, the plaintiff replied specially—to this special replication the defendant demurred, and the court overruled the demurrer. The judgment of the court in overruling this demurrer is assigned for error. We have not deemed it material to set out the facts disclosed by the replication, because we think the case can be disposed of without a decision upon its merits. After the decision of the court, overruling the demurrer, the defendant rejoined to the replication, and took issue thereon. This, we consider, was a complete waiver of the demurrer. If the court below erred, the defendants in that court, to have availed themselves of that error, should have abided by their demurrer, and not traversed the replication. After abandoning the demurrer, they cannot assign the decision upon it for error. The judgment of the court below is affirmed.

Judgment affirmed.

Bell v. Aydelott.

Clark v. Cornelius.

BELL v. AYDELOTT.

Breese R., 20.

Error to Gallatin.

A writ of inquiry to assess damages may be executed in open court.

AYDELOTT brought an action of assault and battery, in the Gallatin Circuit Court against the Bells. Judgment was entered against them for default of a plea, and the court, on motion of the plaintiff, ordered the sheriff to empanel a jury *instanter* to ascertain the damages. The jury, *instanter*, and in the presence of the court, assessed the damages, upon which the court rendered a judgment. The error assigned was, that the court ought to have awarded a writ of inquiry to the sheriff, who should have executed it by a jury, not in the presence of the court.

REYNOLDS, J.—The long and uniform practice in this State has been for the jury to inquire of damages in the presence of the court. This mode is the more easily given in to, when we reflect that this inquiry of damages is had, in the presence, and under the immediate care and direction of the court. If it be absolutely necessary from the old law, as it was contended, for this writ to be executed in the presence of the sheriff, this likewise is done, for generally the sheriff is in the court. This will answer the ends of form, and form it must be, as the substantial ends of justice will be answered by the assessment of damages before the court. We are therefore of opinion, that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

CLARK v. CORNELIUS.

Breese R., 21.

Appeal from St. Clair.

Under the act of 1819, p. 185, a justice possessed no power to investigate an account exceeding \$100, though reduced by credits below that sum.

CLARK exhibited to a justice of the peace for St. Clair county, an account amounting, in all the items, to \$176, against Cornelius, on which account, there was given a credit of \$77, leaving a balance due of \$99. The justice gave judgment in favor of Clark, from which, Cornelius appealed to the Circuit Court. The Circuit Court decided, that the justice of the peace had no jurisdiction, and dismissed the suit; from which decision Clark appealed, and assigned that decision as error.

Clark v. Cornelius.

Poole v. Vanlandingham.

Thompson v. Armstrong.

REYNOLDS, J.—The act defining the duties of justices of the peace, gives the justices jurisdiction in all cases of contract for the payment of money, where the sum demanded does not exceed one hundred dollars.

Under this act, a justice has no power to investigate any account or other claim, exceeding one hundred dollars. When the credit is applied to the claim exhibited, it reduces it below one hundred dollars, yet the justice would have to investigate the whole amount of \$176, as the credit was not applied to any particular item or charge in the account, so as to extinguish it. This power, the legislature never intended to give justices of the peace. We are of opinion that the Circuit Court decided correctly that the justice had no jurisdiction, and we therefore affirm the judgment.

Judgment affirmed.



POOLE v. VANLANDINGHAM.

Breese R., 22.

Appeal from Gallatin.

IN this case, which was debt upon a note, the court held :

1. That *nil debit* was a good plea.
2. That a plea of no consideration was proper.
3. That a plea of failure of consideration without showing how the consideration failed, was bad.
4. The court was divided in opinion as to the *onus* in case of a plea of *no consideration*.
5. Where a demurrer is improperly sustained to a plea, the court will remand the cause with leave to plaintiff to take issue upon the plea.
6. The court gave judgment that the costs abide the event of the suit.



THOMPSON v. ARMSTRONG.

Breese R., 23.

Appeal from Madison.

1. A note "which may be discharged in pork" is assignable in Illinois.
2. Note made in a sister State, and assigned to the plaintiff—but declaration is silent as to place of assignment—the court will presume it was made in this State.
3. Due diligence by suit against the maker is necessary to charge the assignor.
4. Note made in 1814, payable in 1817, assigned in 1815; suit against the maker in 1818. This is not the diligence required by the statute.

Thompson v. Armstrong.

5. A count that at the time the note became due, the maker was insolvent, and has so continued, is a sufficient excuse for not using diligence by suit.

THIS was an action commenced by the plaintiff, the appellant, against the appellee in the Madison Circuit Court, upon his liability as assignor of a promissory note. The note was executed in the State of Kentucky by one Colston O. Wallis, on the 30th day of August, 1814, for the payment of a certain sum of money in pork, at a stipulated price, made payable to the defendant on the first day of January, 1817. On the second day of March, 1815, the note was assigned by the defendant to the plaintiff. The declaration contains no averment of the place of assignment. It further appeared, that on the first day of June, 1818, the plaintiff commenced an action in the Muhlenburgh Circuit Court, State of Kentucky, against the maker of the note, and prosecuted him to insolvency. The second count in the declaration contains all the preceding averments, with the addition, "that at the time the note became due and payable, the maker was insolvent, and entirely unable to pay the said note or any part thereof, and has ever since continued, and still is, insolvent and unable to pay the same." To this declaration there was a demurrer, which the court sustained, and thereupon the plaintiff appealed, and assigns for error the judgment of the court below in sustaining the defendant's demurrer.

REYNOLDS, C. J., after stating the facts of the case, delivered the *opinion* of the Court. The court is called upon to say whether, from the state of facts as set out by the plaintiff, he has used due diligence to obtain the amount of the note from the maker. This the court cannot do. It is not averred where the note was assigned. Suit, then, having been commenced in Kentucky, the court cannot know how many terms of the court in that State intervened (if any) between the assignment of the note and the suing out the writ original against the maker, and for aught that appears, suit may have been commenced at the first term after the assignment. The court is inclined to think this ought to appear from the declaration, and that, therefore, the first count is defective, as being too uncertain.

The next objection taken, and which we are called upon to decide, is, that the note was not assignable. If we consider this objection, it will be by presuming a fact not averred, to wit, that the note was assigned in this State. Yielding to that presumption, and the court cannot entertain a doubt but that, agreeably to the spirit and true intent and meaning of the statute authorizing assignments, the note in this case was properly assignable. That statute authorizes the assignment of notes for the direct payment of money, or for the direct

Thompson v. Armstrong.

Street v. Co. Com. of Gallatin.

Collins v. Waggoner.

payment of a specific article of property; *a fortiori*, then, when the note is for a stimulated sum of money to be paid in property.

The next question presented for the consideration of the court is, whether the averment of the insolvency of the maker, in the second count of the declaration, be sufficient to excuse the use of due diligence. Upon this point, it does seem to the court that the human mind cannot be brought to doubt. If there is an utter incapacity to pay, whence the necessity of resorting to the law? The law never requires the performance of a vain and useless act; and surely, a suit would be worse than idle against a man who is utterly insolvent, and would have no other tendency than to multiply costs and increase the party's demand. If the court is correct in this view of the subject, the court below erred in sustaining the general demurrer to the whole declaration. It is therefore considered by the court that the judgment of the court below be reversed, that the plaintiff recover his costs, and that this cause be remanded to the Circuit Court of Madison, for new proceedings to be had not inconsistent with this opinion.

Judgment reversed.



STREET v. COUNTY COMMISSIONERS OF GALLATIN.

Breese R., 25.

Mandamus.

1. A MANDAMUS lies to compel the restoration of an officer illegally removed.

2. When the county commissioners remove their clerk, the cause of such removal must be entered upon the records.

Peremptory mandamus awarded.



COLLINS v. WAGGONER.

Breese R., 26.

Error to Madison.

1. A REPLICATION which departs from the declaration is bad on demurrer.

2. Under an obsolete statute a plaintiff in execution was required to indorse upon the writ that he would receive the bills of the old State bank in payment; if he failed to do so, the defendant had a right to replevy the debt for three years.

Collins v. Waggoner.

Gill v. Caldwell.

Noble v. People.

Foley v. People.

3. If the officer refuses to permit the defendant to replevy—case lies.

4. But if he goes on after such refusal, and levies upon property of the defendant, trespass lies.

Judgment reversed and remanded.



GILL v. CALDWELL.

Breese R., 27.

Appeal from Crawford.

1. OATHS may be administered at common law and under the statute to all persons according to their opinions, and as most affects their consciences. (a)

2. Swearing a witness by the uplifted hand constitutes a valid oath. No Bible need be used.

Judgment reversed.

(a) Cooke's Stat., 796, sec. 1 and 2; McKinney v. People, 2 Gilm R., 540.



NOBLE v. PEOPLE.

Breese R., 28.

Error to St. Clair.

INDICTMENT for forgery. The court ruled

1. That a juror who had simply *formed*, but not expressed an opinion as to the guilt of the accused, was competent to try the cause.

2. That the person whose name was forged, was a competent witness against the prisoner.

3. That a universalist in religion was a competent witness.

Conviction affirmed.



FOLEY v. PEOPLE.

Breese R., 31.

Error to Madison.

INDICTMENT for larceny. The court on error brought, ruled

1. That under the act of 1819, the Circuit Court had no power to hold a special term of court for the trial of a prisoner charged with an offence which was "*bailable*" by law. (a)

Foley v. People.

Morrison et al. v. Primm.

2. That a person charged with larceny may be admitted to bail by the express words of the constitution.

3. That where a statute is plain and unambiguous, there is nothing to construe—it must be obeyed according to its letter.

4. That consent cannot confer jurisdiction upon a judicial tribunal over a subject matter which the laws deny it cognizance over.

Conviction reversed.

(a) The statute now in force empowers the judge to call a special term where an accused person is in custody for a capital offence, or where the crime is punishable by confinement in the penitentiary. Cooke, stat. 626 sec. 45.

MORRISON et al. v. PRIMM.

Breese R., 33.

Appeal from St. Clair.

1. A *suppressio veri* in relation to any material fact, which in justice ought to have been revealed by a party to a contract, furnishes a ground of equitable relief on a bill to rescind.
2. The assignee of a note, who receives it after maturity, takes it subject to all equities which existed between the original parties.
3. Notice to an agent is sufficient to charge his principal.
4. On a bill to cancel notes and enjoin perpetually a judgment rendered against the complainant; money paid upon the contract out of which they arose may be refunded without a special prayer to that effect.

REYNOLDS, C. J.—This was a suit in chancery, commenced by Primm, for the purpose of setting aside a contract made with James W. Davidson and wife, and to enjoin a judgment obtained against himself by Bryan and Morrison upon a note executed under said contract. The bill alleges that sometime in July, 1808, Primm purchased of said Davidson and wife a certain tract of land lying in St. Clair county, which land descended to the wife of said Davidson as heir at law of one Peter Zip, deceased; that said Davidson and wife were to execute to him such deeds as would completely vest in him the same title which the said Zip, deceased, had in the premises. That, accordingly, said Davidson and wife, together with one Jane Everett, who claimed an interest in the premises, did execute to him a deed for said land—that in consideration of such purchase, he agreed to pay the said Davidson the sum of eight hundred dollars, for the payment of which, he executed his note to the said Jane Everett for the sum of two hundred and sixty-six dollars; and for the balance of said purchase money, besides a small part paid, he executed his notes to the said Davidson. The bill further shows that at the time of making said contract, and of the execution of the deed aforesaid, the said wife of Davidson, who was the sole heir to the said Zip, was under the age of twenty-one years, and that since she has arrived at full

age, has refused to execute a deed for said land, without the payment of an additional sum.

It is further shown, that after the note executed to the said Jane Everett became due, it was assigned to Bryan and Morrison, who purchased the same through their agent, William Atchison—that said Atchison had a full knowledge of all the circumstances under which said note was executed. The said Bryan and Morrison, commenced suit upon said note and recovered judgment.

The prayer of the bill is to perpetually enjoin said judgment, and cancel the notes given pursuant to said purchase. An injunction to stay the collection of said judgment was granted by the judge in vacation. The bill as to Davidson and wife was taken *pro confesso*. Bryan and Morrison answered, setting forth their ignorance of all the circumstances under which said note was executed—that they are the innocent purchasers of said note—deny knowing that their agent had any knowledge of said circumstances, but do not deny that their agent possessed such information. During the progress of the suit in the court below, the injunction was dissolved, and the said Bryan and Morrison proceeded and collected their judgment. Upon the final hearing of the cause, the court below decreed that the notes should be cancelled, and that Bryan and Morrison refund to the said Primm the money so collected. To reverse this decree this appeal is prosecuted. We will first consider whether the bill contains equity, if so, whether that equity attaches upon the note in the hands of Bryan and Morrison.

The knowledge by Davidson of his wife's being under age at the time of executing the conveyance, and not disclosing that fact to Primm, is surely a suppression of the truth; add to this, the fact of his wife's disagreement to the contract after she arrived at full age, and I think it will not be contended that the bill contains no equity. Between Primm, then, and Davidson and wife, the decree ought to be affirmed.

The next inquiry is, does this equity extend to Bryan and Morrison? They do not deny that Atchison, their agent, had knowledge of Primm's equity. This of itself would be notice to them.

But regardless of this fact, the note was assigned to Bryan and Morrison after it became due. Under this circumstance, they took it subject to all the equity which attached in the hands of the original payee. It was contended in the argument by the counsel for the plaintiff, that the court erred in decreeing the money to be refunded by Bryan and Morrison, when the bill did not pray for such relief.

It will be remembered, that the prayer as to them, is for a per-

Morrison *et al.* v. Primm.Bloom v. Goodner.

petual injunction, that after the injunction was dissolved, they proceeded and collected their judgment. Could not the court then decree the money to be refunded? We have no hesitation in saying they could. Otherwise, the complainant would be turned round and compelled to seek his redress by an action at law. If the injunction had been made perpetual, without this additional relief, the same absurdity would have followed. Let the judgment of the court below be affirmed and the defendant recover his costs.

Judgment affirmed.



BLOOM v. GOODNER.

Breese R., 35.

Appeal from St. Clair.

IN a case of forcible detainer arising under the act of 1819, the court held:

1. That all of the jurors must *sign* the verdict. But as the record showed that twelve were *sworn*, and eleven signed and did not show that any objection was made in the court below, it must be regarded as a clerical mistake in making up the transcript.

2. Under that statute *actual force* was requisite to constitute a detainer.

3. The inquisition need not be upon the premises.

4. It is discretionary with a court to hear additional testimony after the argument has commenced.

Judgment affirmed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN NOVEMBER TERM, 1823.

PRESENT :

THOMAS REYNOLDS, CHIEF JUSTICE.

JOHN REYNOLDS,

THOMAS C. BROWNE,

WILLIAM WILSON,

} ASSOCIATE JUSTICES.

CRANE *v.* GRAVES.

Breese R., 37.

Appeal from St. Clair.

THE only point decided in this case was, that where a copy of the instrument sued on was filed with the declaration, but the declaration did not conform to the copy, or original, on the contrary omitted *material* words, and a demurrer was sustained to the declaration, and the plaintiff amended, it was held that the defendant was not entitled to a continuance of the cause. (a)

Judgment affirmed.

(a) The statute of Illinois then required, and now requires, that the plaintiff shall file his declaration ten days before the term of the court to which the process is returnable, together with a *copy* of the written instrument or account upon which the action is based. Cooke's Stat. 258, sec. 8.

WHITE *v.* STAFFORD.

Breese R., 38.

Appeal from Greene.

UNDER the statute of 1827, which required a non-resident plaintiff to give security for costs *before* the commencement of the suit, *it was*

White v. Stafford.

Tarlton v. Miller.

held, that a bond for costs filed before the trial, but after the institution of the action, was in time. (a)

Judgment affirmed.

(a) This is not the law of Illinois now. The present statute provides that the security shall be given *before* the institution of the suit; *and if not so given*, the cause *shall be dismissed* on motion. Cooke's Stat. 244 sec. 2.

TARLTON v. MILLER.

Breese R., 39.

Appeal from Gallatin.

The fact that the maker of a note cannot be found, upon diligent search, in the county where the note was made and indorsed, when the note became due, constitutes no cause of action against the assignor under our statute.

THIS was an action commenced in the Gallatin Circuit Court, by Miller against Tarlton, upon his liability as assignor of a promissory note, executed at the county of Gallatin, by one Squire Brown, to Tarlton, and by him assigned to Miller. The first count of the declaration averred, that, "at the time the note became due, diligent search was made at the said county, for the said Brown, for the purpose of demanding payment of the said note, but that said Brown could not, on such search, be found—that the said note remains unpaid, of which the said Tarlton had notice, whereby an action has accrued," etc. There was also a count for money had and received. On the trial, the defendant moved the court, in conformity with a statute of this State, to instruct the jury to disregard the first count, on the ground of its being defective, which motion the court overruled, and gave judgment for the plaintiff, from which judgment the defendant appealed.

REYNOLDS, C. J.—The question to be decided in this case, is, is the first count sufficient? I suppose the counsel who drafted the declaration, intended to present a case which would excuse the use of due diligence; but surely, it cannot be seriously contended, that because the maker of a note does not reside, or cannot be found in the county in which the note was made, that therefore the assignor becomes liable. It may be, that he may reside in the next adjoining county, or some other part of the State; if so, I conceive it to be the duty of the assignor to seek him. The question of due diligence having been settled by this court to be, *by suit*, that course cannot be dispensed with, where the process of the law can reach the maker, and prove availing.

Tarlton v. Miller.

It has been contended by some, that where the maker has absconded or left the State, the assignor is not liable until suit by attachment is prosecuted. This question is not now necessary to be settled, as the declaration contains no averment of the absence of the maker from the State. But it is said, that the facts disclosed on the trial, show such absence. My answer is, that this is showing facts not averred in the declaration, and cannot be regarded upon a motion to instruct the jury to disregard a faulty count—such motion, standing upon the same grounds as a general demurrer. We are therefore of opinion, that the judgment of the court below be reversed, and the cause remanded for new proceedings to be had, not inconsistent with this opinion.

REYNOLDS, J., dissented. His opinion is inserted at length. 1. Because the question is a novel one. 2. Because only two of the judges sustained the decision; Judge Brown having sat upon the trial in the court below. The reasons of the dissent were these. The record shows this case. That one Squire Brown, made his obligation to Tarlton, for a sum of money. Tarlton assigned the same to George Miller, the plaintiff below, for value received. That Brown left the county before the bond became due, so that no diligence by suit could be used at the time the bond became due, to get the money of Brown. The declaration states, that the bond was made and assigned in the county of Gallatin. The question is, was Brown's absence equivalent to due diligence by suit, in order to obtain the money? I think it was. Diligence is now explained by the court to mean a suit at law, yet when the person against whom the suit is to be brought is not in the county, it would be useless to commence it. This allegation is contained in the declaration, and it is the same as if a suit was prosecuted without getting the money. There can be no necessity for stating the place of residence of the maker of the note, as was contended by plaintiff in error, to show that he had left it—stating the place where the bond was made is sufficient. A person, having no permanent residence at any particular place, may make a note, and it would therefore be impossible to show his residence. A transient person may make a note, and leave the place where it was made immediately; it would then be unreasonable, that the assignee should lose his action against the assignor, because the maker had no residence at the place where the note was made.

Edwards v. Beard.

Whiteside v. Bartleson.

EDWARDS v. BEARD.

Breese R., 41.

Error to St. Clair.

1. UNDER the act of March 27, 1819, the tax levied by the county upon property is *in rem*, and not against the person of the owner.

2. A bill in equity may be dismissed on motion, where the court is satisfied that there is no equity upon the face of the bill.



WHITESIDE v. BARTLESON.

Breese R., 42.

Error to Madison.

In an action for money had and received, the court cannot, without the intervention of a jury, assess the damages. (a)

REYNOLDS, C. J.—This was an action of *assumpsit*, containing only a common count for money had and received. The court below rendered judgment against Whiteside, in favor of Bartleson, and assessed the damages without the intervention of a jury, and it is to reverse this judgment that this writ of error is prosecuted. The liability of Whiteside arose upon his return of an execution as sheriff of Madison county, and this return being reduced to writing and remaining upon file in the clerk's office of said county: It was therefore contended that this makes his liability certain, and authorizes the court to assess the damages. If this argument be yielded, it would follow, that in every case, where a fact could be made certain, the court, and not a jury, should try the cause. The consequences which would flow from such a proposition, would be too absurd to admit the principle. The right of trial by jury would be thereby destroyed, and the interference of the court regulated, not by the certainty of the matter contained in the declaration, but by matter *dehors*.

The execution, with the return of the sheriff, when that return shall be proved, would certainly be evidence—but evidence for a jury, and not for the court.

A jury should have been empannelled to assess the damages—this not having been done, it is error, for which the judgment ought to be reversed.

Judgment reversed.

(a) Only two of the four judges joined in this opinion.

White v. Thompson. Rountree v. Stuart. Forrester v. Guard. State Bank v. Kain.

WHITE v. THOMPSON.

Breese R., 43.

Error to Gallatin.

WHEN a plea is on file, whether in bar or abatement, it is error to render a judgment by default.

Judgment reversed.

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ROUNTREE v. STUART.

Breese R., 43.

Error to Madison.

WHERE the action is upon a bond, and the plaintiff fails to make, profert, or annex a copy to his declaration, and upon demurrer sustained is allowed to amend, the defendant is entitled to a continuance, and if it is refused by the inferior court, a writ of error lies. (a)

Judgment affirmed.

(a) Two of the judges did not hear the argument, and the other two were divided in opinion. But the one who was for reversal was evidently right: 1, Because profert was necessary at common law; 2, Because the statute required a copy to be filed with the declaration. Either omission disabled the defendant from preparation for defence.

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FORRESTER v. GUARD.

Breese R., 44.

Appeal from Gallatin.

1. THE simple statement of a juror, disclosed by the affidavit of a party, is not sufficient to impeach the verdict.

2. On a motion for a new trial, on the ground of newly-discovered evidence, the party must at least set forth the names of the witnesses, and the facts they will depose to.

Judgment affirmed.

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STATE BANK v. KAIN.

Breese R., 45.

Error to Fayette.

1. ALL banks may receive money upon deposit.

2. The receipt of the cashier is prima facie evidence against the bank.

Judgment affirmed.

D. Blackwell, for plaintiff.

Kane and *McRoberts*, for defendant.

Ackless v. Seekright.

ACKLESS v. SEEKRIGHT.

Breese R., 46.

Appeal from Monroe.

1. Under the ordinance of July 13, 1787, for the government of the Northwestern Territory, to make a will valid, it must be subscribed by three attesting witnesses.
2. Where there *are* three subscribing witnesses, *but one is a devisee*, this is a compliance with the ordinance.
3. A. devises to B.; but if she dies before majority, then to C. C. died before B., and B. died before she became of age. This constitutes an *executory devise*, and the estate passes to the heirs of C.

REYNOLDS, C. J.—This was an action of ejectment, commenced by the defendant here in the court below, to recover the possession of certain lands lying in the county of Monroe. The ability with which this case was argued, and the magnitude of the claim, has induced this court to bestow more time on its investigation than in any ordinary case. Four errors have been assigned as causes for reversing this judgment, and if either of them is well taken, the plaintiff in error must prevail.

1. The will set out in the record was not legally attested by three witnesses, one of the witnesses being a devisee.
2. The will was not proved according to law.
3. By the will, George Lunceford took nothing.
4. The contingency upon which the devise was to take effect did not happen.

We will consider these questions in the order in which they are presented; and 1, The will was not legally attested by three witnesses, one of the witnesses being a devisee. Without deciding how far this would affect the validity of a will where it was required that three "subscribing" witnesses should prove it, it is a sufficient answer that, by the law which governs in this case, but two of the subscribing witnesses are required to establish the execution of a will, and when thus proven, is good to all intents and purposes. 2. The will was not proved according to law. In answer to this objection, the court need only add that the will was proven by two competent witnesses (the said devisee not being one of them), before the proper officer, and in such manner as comported with the statute. Having disposed of the two first errors assigned, the court will consider the two last together. Daniel McCann, by his last will and testament, dated the 27th day of January, 1806, after ordering his legal debts to be paid, devised his estate as follows:

"I give and bequeath all my residue and remainder of my personal and real estate, goods, chattels, and credits, and lands, and tenements, and hereditaments of what kind and nature soever, to my beloved daughter Rebecca; and it is my further will and desire that, should

the Almighty take away my said beloved daughter Rebecca before she comes of age to receive the said legacy, then and in that case the same personal and real estate to return to my beloved friend George Lunceford, to whom I bequeath the same on the proviso above mentioned."

George Lunceford, the executory devisee, was by said will appointed one of the executors, and died in the year 1808. The testator died in possession of the premises in the year 1806. Rebecca McCann, the devisee, died in the year 1815 or 1816, and under the age of twenty-one years. It was contended for by the counsel for the plaintiff in error that, by the devise to Rebecca McCann, she took an estate in fee simple, and that therefore the limitation over to George Lunceford was void, being repugnant to the previous estate granted; and in support of this position, the case of *Jackson v. Robbins*, 16 Johns. Rep., p. 537, was cited and relied upon. We have examined this case minutely, but cannot say it will warrant this conclusion. One of the principles there decided grew out of the effect to be given to Lord Sterling's will. He devised his estate to his wife, and then said, "In case of the death of my wife without giving, devising, and bequeathing by will, or otherwise selling or assigning the estate or any part thereof, he doth give and devise all such estate as should so remain unsold, undevised, or unbequeathed, to his daughter, Lady Catharine Duer." This limitation over was there adjudged (whether considered as a remainder or as an executory devise) bad. That case differs materially from the one before the court. In the first, an express power was given to Lady Sterling to dispose of the estate in such manner as she should think proper. In the latter no such power is given to the first taker, but the interest of the executory devisee is made to depend entirely upon the contingency of the first taker dying before she "becomes" of age to receive the legacy. This power of disposing of the estate given to the first taker has been considered, even from the time of Lord Coke, as carrying the absolute fee, except when coupled with a life estate; then it is said that a power to sell creates no greater interest. If the power of absolute disposal had been given to Rebecca McCann, we might well question the validity of the limitation over, for the very essence of an executory devise consists in the inability of the first taker to destroy it by disposing of the estate devised. In the emphatic language of the books, it cannot be created, and it cannot live under such a power in the first taker.

Hence, and hence only, do we account for the decision in the case referred to in 16 Johns. Rebecca McCann surely took a fee, but a fee conditional, subject to be defeated upon her dying before she

Ackless v. Seekright.

Everett v. Morrison.

arrived at full age, and not, as was supposed by the counsel, a fee absolute.

There is no doctrine better settled than that a fee may be limited after a fee, and this happens, says Justice Blackstone, in his second vol. Com., p. 172, "When a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency, as if a man devises land to A. and his heirs; but if he dies before the age of twenty-one, then to B. and his heirs, this remainder, though void in a deed, is good by way of executory devise." See 12 Mod. 287, 1 Vern., p. 164.

Another very strong case is reported in second Wilson, p. 29. Goodright, *ex dem.* etc. v. Searle and wife. The devise was to P. his heirs and assigns forever, but if he should die before he should attain the age of twenty-one years, leaving no issue at the time of his death, then the same was devised to C. her heirs and assigns forever. This the court held to be a good executory devise, and surely the words of inheritance are equally as strong as in the case before the court. Having disposed of this branch of the subject, we will next inquire, whether the circumstance of George Lunceford dying before the contingency happened upon which he was to take, destroyed his interest, and if not, whether he had such an interest as would descend to his heirs at law. As evidence that at common law, contingent remainders and executory devises are transmissible, and will descend to the heirs of the person to whom they are limited, although he chance to die before the contingency happens (without further reasoning), the court refer to Pollexfen, 54; 1 Rep. 99; Cas. Temp. Talbot, 117; 7 Cranch, 469; P. Williams, 564; 2 Munford, 479.

Judgment affirmed.

Kane, for plaintiff.

Starr and Baker, for defendant.

EVERETT v. MORRISON.

Breese R., 49.

Appeal from St. Clair.

Where a verbal credit is given to one, upon the oral promise of another as surety, the undertaking of the latter is void under the statute of frauds.

THE facts of the case were as follows:

This case came into the circuit court of St. Clair county, by appeal from the judgment of a justice of the peace in favor of Everett against Morrison. The circuit court reversed the judgment of the justice,

Everett v. Morrison.

and gave judgment in favor of Morrison, and from which Everett appealed to this court. The bill of exceptions taken on the trial in the Circuit Court, presents the following state of facts: William Padfield, a witness sworn on the part of Morrison, stated that in August, 1817, he was selling goods as agent for Morrison, at witness' house in St. Clair county—that Bailey applied to witness, to purchase goods on credit, which was refused. Bailey then produced Everett, who agreed to go Bailey's security for the amount of goods Bailey wanted, with which agreement witness was satisfied, and sold to Bailey goods out of the store to the amount of the account sued on—to wit:

"Aug. 9, 1817.

"ISAAC J. RILEY,	Dr.	To WILLIAM MORRISON,	
For goods delivered by William Padfield—David Everett,			
security,			\$46 50
		"WILLIAM PADFIELD, sen'r."	

Witness told Everett that he would charge the goods to Bailey, and set him, Everett, down as security, which he accordingly did, by charging the goods to Bailey in a book, and placing the name of "David Everett, security," at the top of the account. Witness stated that he would not have given credit to Bailey for the goods, but sold them on the credit of Everett. The goods were sold on a credit of four or six months. Bailey remained in the county about eighteen months after the sale, but no attempt was made by Morrison to coerce payment from him. On the part of the defendant, it was proved, that sometime in the summer of 1819, at the house of Padfield, Everett told Padfield, that Bailey was then in St. Clair county, and had property enough to pay the debt, and desired Padfield to coerce payment; and Robert Thomas proved, that early in that summer, he was at Padfield's, and saw Bailey there with a valuable horse, which witness knew to be the property of Bailey, and that Bailey also had a wagon load of flour, etc. Everett also offered in evidence this receipt;

"August 23, 1819.

"Received of David Everett, \$16 25, the amount of his account in the store at my house.

"WILLIAM PADFIELD,
"for WM. MORRISON."

The witness, Padfield, testified that that receipt embraced only Everett's private account. This was all the evidence in the cause; upon which Everett insisted, that his undertaking being parol, was within

Everett v. Morrison.

the statutes of frauds and perjuries, and not binding. The court, however, gave judgment for Morrison, to reverse which, Everett appealed, and assigned for error the misdirection of the court in deciding that he was liable, on the undertaking as above set forth.

WILSON, J.—The judgment of the court below is reversed, because it appears that the undertaking of Everett was only collateral, and as such, came within the statute of frauds and perjuries.

DISSENT OF REYNOLDS, J.—The bill of exceptions in this case presents a state of facts not very satisfactory. It is really difficult to know if Everett be the security of Bailey, or the principal in this transaction. But from the best consideration I am capable of bestowing on this case, I conclude that Everett was the person to whom the credit was given, and therefore liable. The witness states expressly, that he would not give credit to Bailey, but that the credit was given to Everett, yet in the same deposition he says, Everett was the security of Bailey, and the charge is so made. There being no writing in the case, it was contended that Everett was not liable, as it was within the statute of frauds and perjuries. I am of opinion, according to the whole state of facts as shown, that Everett is liable.

Judgment reversed.

D. Blackwell, for appellant.

Elias Kent Kane, for appellee.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN NOVEMBER TERM, 1824.

PRESENT:

THOMAS REYNOLDS, CHIEF JUSTICE.

THOMAS C. BROWNE,
JOHN REYNOLDS,
WILLIAM WILSON, } ASSOCIATE JUSTICES.

HUNTER v. GILHAM.

Breese R., 54.

Error to Madison.

UNDER the act of March 22, 1819, the bail bond to the sheriff, could not be assigned to the plaintiff who sued out the writ of *capias ad respondendum*, nor could a suit be brought in the name of the plaintiff. (a)

Judgment affirmed.

Starr, for plaintiff.

Smith, for defendant.

(a) The plaintiff may now sue in his own name. Cooke's Stat., 287, sec. 4.

MASON v. EAKLE.

Breese R., 52.

Error to Madison.

1. WHERE a note stipulates that twenty per cent. interest shall be paid upon the principal debt, a judgment upon the note merges the

Mason v. Eakle.

Lusk v. Cook.

interest, and from thenceforth the judgment draws only six per cent. interest.

2. An execution upon such judgment calling for twenty per cent. interest will be quashed or set aside on motion.

Judgment reversed.

Starr, for plaintiff.

Smith, for defendant.



LUSK v. COOK.

Breese R., 53.

Appeal from Madison.

1. To constitute due diligence by the assignee of a promissory note under our statute, he must sue the maker at the first term of the court which has cognizance of the subject matter which is held after the note matures.
2. When a declaration contains two or more counts, one of which is good, and the other or others bad, a demurrer to the whole declaration must be overruled.
3. But where a single count contains one good and one bad averment, and yet the count shows a good cause of action, the bad matter will be rejected as surplusage, and a general demurrer to the count will be overruled.

THE facts are imperfectly stated by the reporter, and reliance must be had upon the inferences deducible from the opinion of

REYNOLDS, C. J.—The second averment in the declaration, is an attempt to show the use of *due diligence* by suits to enforce payment of the maker, and prosecuting him to insolvency. This averment cannot be considered sufficient, for the reason that the plaintiff has not availed himself of the earliest means which the law afforded him, but suffered himself to sleep, until one or two terms of the court had elapsed after the notes became due, before prosecuting his suits against the maker. The law is, that where the assignee seeks to recover of the assignor, on the ground that he has used due diligence to obtain the money of the maker, but has failed, he must show that he commenced his action against the maker, at the first term of the court, which happened after the note became due, provided there be proper time for the service and return of the writ.

As to the first averment, the court has nothing further to say, than what was said in the case of *Thompson v. Armstrong*, ante, page 20.

They have neither seen nor heard anything that has induced them to disturb that opinion. The two cases are entirely apposite. The first averment, then, must be deemed to contain a good cause of action, and the demurrer being a general one, ought to have been

overruled. There is no principle in pleading better settled than when a declaration contains several counts, one of which is good and the others bad, that a general demurrer to the whole declaration cannot be sustained. So, too, where a count contains two distinct averments, one of which gives a cause of action, and the other does not, the bad averment must be regarded as immaterial, and does not vitiate the whole count of declaration, and a general demurrer thereto ought not to be sustained.

We have shown that the second averment in the declaration does not constitute a sufficient ground of action, and therefore is not, according to the technical doctrine of the law, double. It must be esteemed as *surplusage*, and wholly immaterial, and the defendant below should have disregarded it, and taken issue upon the first averment, which is the substantive cause of action, as determined in the case before cited, the rule being that *utile per inutile non vitiatur*. The judgment below must be reversed, and the cause remanded, with liberty to the defendant to withdraw his demurrer, and take issue upon the first averment in the declaration.

Judgment reversed.

Smith and *Starr*, for appellant.

Lockwood, for appellee.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN JUNE TERM, 1825.

PRESENT:

WILLIAM WILSON, CHIEF JUSTICE.

THOMAS C. BROWNE,

SAMUEL D. LOCKWOOD,

THEOPHILUS W. SMITH,

} ASSOCIATE JUSTICES.

CHANDLER v. GAY.

Breese R., 55.

Error to St. Clair.

THIS cause was upon an award made in pursuance of a submission under a rule of court. The statute has been superseded by a new one (*a*), and it is unnecessary to give the opinion in full, but simply the rulings of the court.

1. Such statutes are to be construed literally and strictly.
2. The court cannot set aside the award for any common law cause, but only for those causes expressly provided for by the statute.
3. That no judgment can be entered upon the award, but that a rule shall be entered to show cause why the award shall not be executed, and if no statutory cause is shown, then the award must be enforced by process of contempt.
4. That where the circuit court enters a judgment improperly upon an award, the judgment will be reversed and the cause remanded for further proceedings in conformity with the *letter of* the statute.

Reversed and remanded.

Taylor v. Kennedy.

Johnson v. Ackless.

More et al. v. Bagley.

TAYLOR v. KENNEDY.

Breese R., 58.

Error to Crawford.

DEBT on bond—oyer craved—demurrer—variance between the declaration and oyer as to the time when the bond was executed—held fatal.

Judgment reversed.

JOHNSON v. ACKLESS.

Breese R., 59.

Appeal from St. Clair.

THE points decided in this cause arose under an obsolete statute which provided that upon appeals from justices of the peace to the Circuit Court, neither party should be allowed a continuance of the appeal after the second term of the court to which the appeal was taken. The fact was that the appellate court took the case under advisement until the fourth term after the appeal was perfected. At the fourth term, during which judgment was pronounced, the defeated party obtained a bill of exceptions. The cause was tried by the court without the intervention of a jury. Two points were decided.

1. That the act of the legislature did not deprive the court of the power to take a case under advisement for an indefinite length of time.

2. That where the court decided both the questions of law and fact involved in a particular cause, a bill of exceptions taken during the term at which the judgment was pronounced, is regular.

*Judgment reversed.**D. Blackwell*, for appellant.*Cowles*, for appellee.

MORE et al. v. BAGLEY.

Breese R., 60.

Appeal from Greene.

THE only point decided upon this appeal was, that, where a party has a defence at law, and an opportunity of making it, and neglects to avail himself of his defence, he cannot, after being defeated in a

More *et al.* v. Bagley.Browder v. Johnson.

court of law, secure the aid of a court of equity to relieve him from his negligence.

Decree reversed.

McRoberts, for appellant.

BROWDER v. JOHNSON.

Breese R., 61.

Appeal from Washington.

THE only point decided in this cause is substantially this—the record of the Circuit Court consists of the process and return thereon, the pleadings of the parties, the verdict of the jury, and the judgment of the court. All else must be made a part of the record by a bill of exceptions. That when affidavits are embodied by the clerk, in the transcript of the record forwarded to the Supreme Court, in pursuance of a writ of error, they cannot be regarded as a part of the record in the appellate court. (a)

Judgment affirmed.

Starr, for plaintiff.

McRoberts, for defendant.

(a) S. P. in criminal cases, *McKinney v. People*, 2 Gilm. R., 540.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1825.

PRESENT :

WILLIAM WILSON, CHIEF JUSTICE.

THOMAS C. BROWNE,	}	ASSOCIATE JUSTICES.
SAMUEL D. LOCKWOOD,		
THEOPHILUS W. SMITH,		

CORNELIUS v. WASH.

Breese R., 63.

Appeal from St. Clair.

An attorney, counsellor, or solicitor, cannot delegate his authority ; and if he fails to perform his duty in person, he cannot recover compensation from his client, although he may have employed another lawyer in his stead.

WASH sued Cornelius before a justice of the peace in St. Clair county, for his services as attorney and counsellor, and recovered a judgment against him, from which judgment Cornelius appealed to the Circuit Court of said county. Trial, and verdict in the Circuit Court for Wash for \$59 in damages. A motion was made by defendant for a new trial which was overruled, and thereupon a bill of exceptions was taken, from which it appears, that on the trial of the cause in the Circuit Court, the plaintiff, Wash, read in evidence to the jury, the following obligation, viz. :

BELLEVILLE, Nov. 9, 1819.

Whereas I have employed R. Wash in the suit instituted by George, a black man, against Robert Whiteside and F. Bradshaw, for the recovery of his freedom, I hereby promise and oblige myself to pay to said R. Wash, or order, the further sum of fifty dollars, as witness my hand and seal,

JOSEPH CORNELIUS. [*Seal.*]

as the foundation of his action, and proved by H. Starr, that the suit, in the obligation mentioned, had been removed to the Randolph Circuit Court, and was there tried in the fall of 1820, and decided in favor of George, the black man, in the obligation mentioned, and his right to his freedom thereby established; but the plaintiff did not prove that he rendered any service in said suit as counsellor or attorney for said George. This was the evidence on the part of the plaintiff. The defendant by his counsel then moved the court to instruct the jury as in case of a non-suit, because the plaintiff's evidence did not show that he had rendered any service in said suit as attorney for George, and was not entitled, therefore, to recover on the obligation. The court refused to give the instructions asked for, but instructed the jury, that if they believed that the obligation imposed on Wash the duty of rendering services in the action as attorney, they should find for the defendant, but if they believed that by the contract specified in the obligation, that Wash was to have the \$50 on George's recovering his freedom, whether Wash rendered services in the cause or not, then they must find for the plaintiff; and the court left the construction of the contract thus far, to the jury. Mr. Starr was then cross-examined by the defendant, and stated that the suit in question was tried in the St. Clair court at the June term, 1820, that he had no recollection that Mr. Wash was at court, or had anything to do with the management of the cause, but that Mr. Peck appeared for George and managed the cause with ability, that a verdict was rendered for George for more than \$400, and that the verdict was set aside and a new trial awarded, and that the cause was removed to Randolph county, and there tried as above stated, that he appeared for George as attorney there, that George employed him, and that Mr. Wash was not there. It was further proved that the suit in the obligation mentioned, was commenced in the St. Clair court in July, 1818, by the late Mr. Mears, and in all the steps taken in the cause, Wash's name nowhere appeared as attorney. It was further proved by D. Blackwell and J. Turney, that on the trial in June, 1820, on calling the cause, that Mr. Wash did not appear on being called, and that Mr. Peck, and Mr. Carr, both lawyers, voluntarily told the court that they would attend to the cause for Mr. Wash, and they did attend it at that time. It was further proved that Mr. Carr became the partner of Mr. Wash in the spring of 1820, but there was no proof that either Mr. Peck or Mr. Carr, was employed by Mr. Wash to represent him in the cause. The defendant proved by his own oath, that Carr exacted a fee from him for those services of \$25, which he had paid, and said nothing about his being

 Cornelius v. Wash.

concerned with Wash as a partner. The plaintiff then gave in evidence the following writing under seal, viz.:

BELLEVILLE, Nov. 9, 1819.

Three months after date I promise to pay R. Wash, or order, sixty dollars for value received, as witness my hand and seal.

JOSEPH CORNELIUS. [*Seal.*]

and proved that it had been given to him by defendant at the same time, to secure a fee in the same suit for his services as attorney, etc., and that at the last term of the St. Clair court, an action was tried on the note between the present parties, and that defendant relied on a failure of consideration on the ground that Wash did not render any services, and the jury found a verdict for him, Cornelius. Here the evidence closed, and the court instructed the jury further, that although the plaintiff did not in person attend to the suit for George, yet if Peck and Carr did attend to it for him as well as Wash could have done, Wash would have a right to recover, and they ought to find for him. The defendant excepted to this opinion, and appealed to this court.

LOCKWOOD, J.—Two questions are presented in this case: 1. What is the true construction of the obligation made by the plaintiff in error to the defendant in error? 2. Ought the instructions prayed for, to have been given to the jury? On the first point, the court are of opinion, that by the true construction of the contract of the parties, the relation of client and counsel was created, and that it became necessary for Mr. Wash, either to have contributed his legal knowledge and assistance in the suit of George against Whiteside and Bradshaw, or have been ready and willing at the trial, to have aided and conducted the suit to its final termination. The confidence reposed in counsel, is of a personal nature, and cannot be delegated without the consent of the client. The evident object of the party, in making this contract, being to obtain the legal services of Mr. Wash in prosecuting the suit, the court ought to have instructed the jury, that, unless they believed Cornelius had dispensed with the personal services of Mr. Wash, they ought to find for Cornelius.

In relation to the second charge given to the jury, to wit: "that although the plaintiff did not in person attend to the suit for George, yet if Peck and Carr did attend to it for him, as well as he, Wash, could have done, Wash would have a right to recover." If the court is right in their construction of this contract, this instruction was clearly wrong. In the employment of counsel to manage a cause, the client is governed by a variety of considerations which relate to the

Cornelius v. Wash.

Wright v. The People.

The People *ex rel.* v. Geo. Forquer.

character, learning and skill of the lawyer, and whether the client exercises a sound judgment in his selection, is a matter in which he alone is interested, but he is entitled to receive the identical legal services he has contracted for. It may with propriety be asked, by what rule could a jury decide, whether Peck and Carr did render the same services that Wash might have done, had he been present? It is only sufficient to state the question, to show the utter impracticability of its being determined by a jury. They can have no data on which to predicate an opinion. The judgment must be reversed with costs, with permission to the defendant in error, to have the cause remanded to the Circuit Court, for further proceedings not inconsistent with this opinion.

Judgment reversed.

D. Blackwell, for plaintiff.

H. Starr, for defendant.



WRIGHT v. THE PEOPLE.

Breese R., 66.

Error to Madison.

THE court ruled in this cause that the fraudulent separation of the penal and conditional parts of a bond, is not a criminal offence under the statute or at common law.

Conviction reversed.



THE PEOPLE *ex rel.* v. GEO. FORQUER.

Breese R., 68.

Motion for Mandamus.

THIS case possesses a historical interest, but the points decided are familiar to the profession. The facts will be stated briefly, and the conclusions of the court given. In 1825, Edward Coles was governor and Adolphus F. Hubbard lieutenant-governor of the State of Illinois. Governor Coles left for the East, July 18, 1825, and by letter notified Mr. Hubbard "that the duties of the office of governor would devolve upon the latter" during the absence of the former. Coles' absence was temporary. He returned to Illinois within three months after his departure. When he returned, Hubbard claimed to be governor, upon the ground that Coles had abdicated or forfeited his title to the

The People *ex rel.* v. Geo. Forquer.

Hargrave v. Bank of Illinois.

office by his departure from the State. On Nov. 2, 1825, during the vacation or recess of the legislature, and after Coles' return, Hubbard, to make a test case upon the question as to who was intitled to the executive functions of the State, appointed William L. D. Ewing, the relator, paymaster general of the State, commissioned him, and directed Forquer, the respondent, who was the then secretary of state, to countersign the commission and affix the great seal thereto. Forquer declined to do this upon two grounds: 1. That upon Coles' return the powers of Hubbard ceased. 2. That the executive had no power to make such appointments during the recess of the Legislature. Thereupon the mandamus was moved. On this application the court ruled:

1. That if the design was to try the title to the office of Governor, a writ of *quo warranto* was the appropriate remedy, not a mandamus.

2. That *the Governor* had no power to appoint a paymaster general during the recess of the legislative body of the State.

3. That the secretary of state could not be compelled to countersign and seal an illegal commission.

4. That they would not compel the secretary to do an act where the right was doubtful.

Mandamus denied.

Hopkins, T. Reynolds, D. Blackwell, and Henry Eddy, for the relator.

Forquer, for the secretary of state.



HARGRAVE v. BANK OF ILLINOIS.

Breese R., 84.

Error to Gallatin.

1. WHERE a private corporation sues to recover real property, or upon a contract, it must, under the general issue, produce its act of incorporation. (a)

2. The act of indorsing a bill of exchange to a bank, does not admit that the bank is a corporation.

Judgment reversed.

Eddy, for plaintiff.

Starr, for defendant.

(a) This is not the law. The general issue admits the capacity of the plaintiff to sue in the character assumed by him, her, or them. *McIntyre v. Preston*, 5 Gilm. R., 60.

Jones v. Bank of Illinois.

Giles v. Shaw.

Morgan v. Hays.

JONES v. BANK OF ILLINOIS.

Breese R., 86.

Error to Gallatin.

SAME ruling as in preceding case.

Judgment reversed.

Same counsel as in preceding case.



GILES v. SHAW.

Breese R., 87.

Appeal from Madison.

1. A VARIANCE between the record of a judgment declared on, and the one produced in evidence is fatal to a recovery.

2. An indorsement on the back of the transcript of a record, though signed by the clerk of the court, is not a part of the record.

3. In certifying a record under the Act of Congress, if the judge omits to certify that the attestation of the clerk is in due form—the certificate is insufficient.

*Judgment affirmed.**Cowles*, for appellant.*D. Blackwell* and *J. Reynolds*, for appellee.

MORGAN v. HAYS.

Breese R., 88.

Error to St. Clair.

1. A court has no power at a subsequent term to set aside a judgment.

2. If they have, they still have no power to order a compulsory nonsuit, but must award a new trial.

SMITH, J.—In this case, it is not deemed necessary to decide more than one of the points presented for consideration.

That one is, the decision of the court below in setting aside the final judgment entered in the cause, at a term subsequent to the one at which such judgment was entered, and directing a nonsuit. On the trial of the cause, the plaintiff below, who is plaintiff here, offered to give in evidence a record of a cause determined in one of the circuit courts of this State. This the defendant's counsel objected to, but the court overruled the objection, and permitted the record to be given to the jury as evidence.

The jury found a verdict for the plaintiff, and a final judgment was entered thereon. The court then continued the cause to the next term, when it set aside the final judgment, and directed a judgment of nonsuit to be entered. Two questions arise here for consideration: 1. Had the court the power, at a term subsequent to the one at which the judgment was *regularly* entered, to set it aside? 2. If so, was a judgment of nonsuit warranted? That courts have not, as a general proposition, the right at a term subsequent to the one at which a judgment is entered, to set it aside, we have no doubt.

The power to readjudicate causes finally disposed of at one term, where the proceedings are regular, at another, and subsequent one, would produce consequences too embarrassing, and lead to endless and contradictory decisions. If a judge could review the final opinion given at one term, at the next, why may it not be imagined, that he might be equally dissatisfied with the second opinion and reverse that, and continue to vacillate, as often as the parties might desire to present their case before him. If, on the trial, either party is dissatisfied with the decision of the court, the remedy for a correction is by excepting to this opinion, or by application afterward for a new trial. Appellate courts are established for the purpose of correcting the errors of inferior tribunals; but if inferior ones possessed the power at all times to review their own decisions, the creation of the appellate jurisdiction was vain and useless. The court was therefore wrong in setting aside the judgment; but as the court, from the confused state of the record, may be supposed to have considered that the case had been reserved for a review at a future term, and as we are by no means satisfied that the plaintiff ought, from the evidence contained in the bill of exceptions, to have recovered, we do not feel disposed to interfere with that part of the decision. On the second point, we are clearly of opinion, that after the judgment was vacated, the court ought to have directed a new trial. On principle and precedent, a nonsuit could not be directed.

The judgment must therefore be reversed, a new trial granted, with directions to the court below to award a *venire de novo*, and that the plaintiff in error recover his costs.

Judgment reversed.

Owen v. Bond.

Taylor v. Winters.

Cornelius v. Cohen.

OWEN v. BOND.

Breese R., 90.

Error to Gallatin.

1. THE State made a lease of saline land to A., with power to reënter for a breach of the covenants therein contained. The covenants were broken, and the agents of the State, instead of reëntering, substituted B. and C. as lessees, and put them in possession. *Held* that the *substitution* was illegal.

2. That upon an agreed state of facts, it is error to enter judgment against one of several defendants who joined in the submission.

Judgment reversed.

TAYLOR v. WINTERS.

Breese R., 91.

Error to Jackson.

1. A PARTY cannot, on motion, quash his own execution for irregularity.

2. An obsolete statute of Illinois provided that if the plaintiff in execution indorsed upon it that "State paper would be received in satisfaction," the defendant might stay the execution sixty days, by giving a replevy bond; if no such indorsement was made, and in consequence the execution became payable in gold or silver coin, then the defendant had the right to replevy for three years. *Held* that when the indorsement was once made, it could not be recalled.

Judgment reversed.

CORNELIUS v. COHEN.

Breese R., 92.

Appeal from St. Clair.

1. The state of slavery being contrary to the ordinance of 1787, must be regarded as a right *stricti juris*.
2. The children of a slave cannot be held in bondage, unless such claim is expressly sanctioned by law; no contract of the slave ancestor can establish the bondage of the children.
3. Conceding the *indenture* of the ancestor to be valid, if entered into in strict conformity with the law, the indenture must be *signed by the master*, or it is illegal.
4. In a controversy between freedom and slavery, no statute relating to the relative rights of the party claimed as a slave shall be construed *retrospectively*.
5. *Quære*. Will replevin lie for a slave?

LOCKWOOD, J.—This is an action of replevin, brought in the Circuit Court of St. Clair county, for the recovery of Betsy, a negro girl.

The facts of the case are, that on the 6th October, 1804, Rachael, a free negro woman, aged 23, entered into a writing (purporting to be an indenture) with the plaintiff, by which she binds herself in the common mode of apprenticeship, to serve the plaintiff for fifteen years. In the indenture, the master binds himself to allow the apprentice meat, drink, lodging, and wearing apparel fit for such an apprentice. The indenture is signed and sealed by Rachael *only*. It was admitted on the trial that Rachael was the mother of Betsy, who was born in the fall of 1805.

On the trial of this cause, the defendant moved the court to instruct the jury that the plaintiff had no right to the negro girl by virtue of the indenture.

2. That if the plaintiff had a right to her services by virtue of the indenture, that replevin would not lie.

3. That the indenture was void, because it was not executed by plaintiff. These instructions the court refused to give, with the reservation that if the court should, after the trial, be of opinion that they ought to have been given, that a nonsuit should be entered.

The Circuit Court, subsequent to the trial, decided that the instructions prayed for ought to have been given to the jury, and ordered judgment of nonsuit to be entered, from which decision the plaintiff prayed an appeal.

From the view taken of this case, it will only be necessary to examine whether the indenture given in evidence was a valid one. This indenture was executed the 6th of October, 1804, and on the 17th September, 1807, the Territory of Indiana passed an "Act concerning the introduction of negroes and mulattoes into this territory." The first section of this act authorizes the owners or possessors of slaves to bring them into the territory. The 2d section authorizes the master to go with the slave before the clerk, and agree with the slave for the term of years the slave shall serve, etc., and the clerk shall make a record, etc. The 13th section of this act was the only one relied on in the argument, as securing the services of Betsy to the plaintiff. That section is as follows :

"That children born in this territory of a parent of color owing service or labor by indenture according to law, shall serve the master or mistress of such parent, the male until the age of thirty, and the female until the age of twenty-eight years."

The first and second sections of this act are clearly prospective, and can have no application to this case. Whether the legislature, by the 13th section, intended by the words, "*by indenture according to law*," to provide for the children of slaves bound to serve for a limited

Cornelius v. Cohen.

Bradshaw v. Newman.

Conley v. Good.

period under the second section, it is difficult to determine; but whether such was their intention or not, the result will be the same. If it be admitted that such was the intention, the children of Rachael cannot by any construction be embraced by it, because Rachael and the plaintiff did not go before the clerk and agree for her services, as the act directs, and the indenture admits that she was free before the passage of the act.

The claim to the services of Betsy under the 13th section is equally inadmissible. The indenture was not executed *according to law*. The indenture, to have been valid, as between Rachael and the plaintiff, ought to have been executed by plaintiff. It is therefore void.

Judgment affirmed.



BRADSHAW v. NEWMAN.

Breese R., 94.

Error to Madison.

1. THE *lex loci* prevails as to the validity and construction of contracts.

2. A plea of failure of consideration to an action upon a note, must show by averment the facts upon which the failure is predicated.

3. A plea of failure of consideration which avers that the note was given for an improvement right upon *public* lands in the territory of Arkansas, without averring that by the local law such transaction was illegal, is bad upon demurrer.

Judgment reversed.

Starr, for plaintiff.

Cowles, for defendant.



CONLEY v. GOOD.

Breese R., 96.

Appeal from Madison.

1. A DILATORY defence, which might have been made before the justice of the peace, cannot be made before the Circuit Court on appeal.

2. The contract of partners is joint and several.

3. An appeal from a justice of the peace is assimilated to an equity cause.

Conley v. Good.

Nowlin v. Bloom.

Curtis v. John Doe.

4. A promise of one of several partners to pay a debt of the partnership is a valid contract.

Judgment reversed.

McRoberts, for appellant.

Cowles, for appellee.



NOWLIN v. BLOOM.

Breese R., 98.

Error to St. Clair.

WHERE a record is not the *foundation of*, but simply stated in the declaration, as the *inducement* to the action, a slight variance is immaterial.

Judgment reversed.

Cowles, for plaintiff.

D. Blackwell, for defendant.



CURTIS v. JOHN DOE.

Breese R., 99.

Error to Washington.

Where the statute requires the sheriff to appraise land levied upon by him under execution, and sell the same at two-thirds of its appraised value, and he does not recite a compliance in his deed, and there is no proof upon the point, the court will not *presume*, in support of the title derived under him, that he performed his duty.

LOCKWOOD, J.—This was an action of ejectment, brought to recover the undivided moiety of a tract of land in the county of Washington. A number of errors have been assigned, but from the view we have taken of the case, it will be unnecessary to decide more than the following question: Was the sheriff's deed to the lessor, sufficient to convey Ryan's interest in the premises? The objection taken to the deed, is, that it does not appear from the deed (and the plaintiff below did not prove by parol) that the premises were appraised, and sold for two-thirds of the valuation. This question is one of great importance to the interest of community, and deserves the most serious and attentive consideration of the court. Its decision will form a highly important rule in the transfer of real estate, that may affect the rights of a great number of individuals. The transfer of real property, by a judicial sale, is unknown to the common law, but is authorized by the statutes of this State.

The legislature, in subjecting real estate to sale on execution, have clearly the right to prescribe the terms on which such sale may be

made, and any material departure from the rules prescribed by the statute, will render the sale void. What, then, are the rules prescribed by our statutes in relation to sales on execution?

It must be confessed that the court find some difficulty in reconciling the 2d, 8th, and 22d sections of the act, entitled "An act subjecting real estate to execution for debt, and for other purposes," passed 22d March, 1819. But whatever uncertainty might grow out of the attempt to reconcile the conflicting provisions of these sections, yet the court have no doubt that the legislature intended, by the 22d section, to require that all real estate should be valued before sale. This section is as follows:

"That *all real estate* that shall be ordered to be sold under the *provisions of this act*, shall be valued by three disinterested freeholders of the county in which the same may be situated, who shall be appointed by the sheriff or other officer, and sworn to take into consideration the true value of such estate in cash, and the said sheriff or other officer, shall then proceed to sell the same: *Provided*, that the said land, or freehold, shall bring the amount of its valuation as aforesaid, or at least two-thirds thereof, but in case the said land or freehold shall not bring the amount of its valuation, or two-thirds thereof, then the said sheriff or other officer, shall continue the sale until the same shall have been offered on three different days, allowing the space of twenty days between each day of sale, giving due notice thereof as before directed, unless the person in whose favor the execution issued, shall agree to take the same at the valuation made as aforesaid."

This statute was amended by an act passed the 15th of February, 1821, which seems to have escaped the notice of the counsel on both sides. By the third and fourth sections of the amended act, the legislature assume the fact, that real estate cannot be sold on execution, unless it will bring two-thirds of its valuation. The third section is intended to authorize lands that have been already valued and not sold for want of bidders, at two-thirds of the valuation, to be sold for one-half of the valuation.

The fourth section of the amended act, is, "That when any real estate shall hereafter be levied upon, by virtue of *any* execution hereafter to be issued, and shall have been twice offered for sale under the provisions of the act to which this is an amendment, and has not brought the amount of its valuation, or two-thirds thereof, upon the third, or any subsequent offering, the sheriff, or other officer, shall proceed to sell it to the highest bidder for what it will bring in ready money, having first given fifteen days' notice as afore-

said." My conclusion is, that the sheriff was bound to proceed on the execution mentioned in this case, according to the directions of the 22d section of the original act, as modified by the fourth section of the amending act. From which it will result, that the sheriff's duty was, to have had the premises valued by three disinterested freeholders on oath, and advertised for twenty days, when, if two-thirds was not bid, he should again have advertised for twenty days, and then if two-thirds was not bid, he could, according to the above-recited fourth section, sell the premises for what they would bring in ready money, having first given fifteen days' notice of the sale. Can the court presume that the sheriff complied with these express provisions of the law? I think not. Would not every lawyer be startled at the proposition, whether the court would not presume in favor of a sheriff's deed, that the sheriff had an execution? And that the execution was based on a judgment? Yet these presumptions appear as reasonable, as the presumption that the sheriff has obeyed the mandates of the statute without showing the fact. Every agent, whether public or private, must act within the power delegated to him, and must show, that in all essential particulars, he has not varied from them. If a party is to be deprived of his property without his consent, the law that authorizes him to be dispossessed must be obeyed, and he has a right to call for proof that he has not been illegally divested of his estate. The argument, that good policy requires that public sales shall be supported, whether the provisions of the statute have been substantially complied with or not, does not appear to be entitled to much weight.

Whether the land has been appraised or not (and it is to this point that we confine our attention), can be very readily ascertained, by the bidders calling for the valuation. We have hitherto considered this case with reference to our statutes, and upon general principles. We are, however, not without authorities on the very point. In the case of *Patrick v. Gideon Oosterout*, 1 Ohio Reports, 27, two questions were submitted to the court: 1. Was it necessary under a sheriff's deed to exhibit the appraisement? 2. Was the appraisement sufficient? The objection to the appraisement was, that it did not appear to have been made on oath. The court, consisting of judges McLEAN and BURNET, held, that a sale without an appraisement was void, and rejected the sheriff's deed, because it did not appear that the appraisement was *on oath*.

They refused to presume that the oath had been taken. It has also been decided in Connecticut (1 Day's Repts., 109), that in order to make out a title to land, by the levy of an execution, it must be

Curtis v. John Doe.

shown that the appraisers were disinterested freeholders, and that they *were sworn according to law*.

In the case of *Parker v. Rule's lessee*, 9 Cranch, 64, the Supreme Court of the United States decided, that, under the land tax act of the 14th July, 1798, c. 92, before the collector could sell the land of an unknown proprietor for non-payment of taxes, it was necessary that he should advertise the copy of the lists of lands, etc., and the statement of the amount due for the tax, and the notification to pay, for sixty days, in four gazettes of the State if there were so many printed therein. Again, in the case of *Snead's executor v. Course*, 4 Cranch, 403, and which arose under the tax laws of Georgia, the Supreme Court decided, that an officer selling land for taxes, must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire, whether he has so acted. In the case of *Williams v. Peyton*, 4 Wheaton, 77, the same court held that in the case of a naked power, not coupled with an interest, the law requires that every prerequisite to the exercise of that power should precede it. That the party who sets up a title, must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it, is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which the validity of the deed might depend. And in this last case, the court decided, that the collector's deed was not *prima facie* evidence.

The court have examined the cases decided in the Kentucky courts, referred to in plaintiff's argument, but think they have but little application to this case. One of the cases was a sale of personal property, which for obvious reasons, is governed by different rules from those of real property. Another of the cases referred to, was the sale of land for taxes. The facts of the case are, however, so imperfectly stated, that it is impossible to extract from the case any rule applicable to the decision of this case.

The last case cited was a case of the sale of land on execution, and the court are perfectly willing to accede that the case was rightly decided under the Kentucky statute.

This court cannot, however, accede to the argument of the court as to what true policy dictates on this subject. We cannot regard the question as altogether a question of policy, but as more a question of positive law. In relation to the cases cited from New York, the court are of opinion that they can have no application here; because, in New York, they have a positive statute making a sheriff's sales valid, however palpable may be his departure from its provisions. The

Curtis v. John Doe.

Randolph County v. Jones.

court feel themselves constrained to say that the sheriff's deed, unsupported by any proof that the land had been valued, was insufficient to entitle the lessor to recover. The judgment must be reversed with costs.

Judgment reversed.

McRoberts, for plaintiff in error.

T. Reynolds, for defendant in error.



RANDOLPH COUNTY v. JONES.

Breese R., 103.

Agreed Case from Randolph.

1. A promise to pay public officers for performing their duty is void.
2. A contract, to be binding, must be mutual.
3. The county commissioners can bind the inhabitants of a county only when they sit as a court.

SMITH, J.—This is an agreed case, and is submitted to the decision of this court by the following agreement:

“It is agreed by the parties in this suit, that a transcript of the record in this cause be taken to the Supreme Court for a decision of this question—Whether the instrument set forth in any count of the declaration can be made the foundation of an action at law, taking all the statements and averments in the said counts to be true?

“If decided in the affirmative, then judgment to be entered up in this court at the next term for the amount of Jones' subscription, and costs accordingly. If decided in the negative, then the said suit to be discontinued, and that the respective parties enter their appearance at the next term of the Supreme Court.”

The instrument declared on is in the following words:

“We, the subscribers, promise to pay to the county commissioners of the county of Randolph, or their successors in office, the sums annexed to our respective names, at such times and in such proportions as the said county commissioners shall require, for the purpose of defraying in part the expense of a court-house for the county of Randolph: *provided* the said court-house *shall be located* and erected on a lot proposed to be granted to the said county by the Hon. Nathaniel Pope.”

The several counts in the declaration allege the consideration to have been the erection of the court-house on the proposed lot, and aver that the lot was granted to the commissioners, that the court-house was erected on the lot, and that the defendant was owner of lots and houses contiguous to such court-house, and assigns the breach a refusal to pay on demand.

The questions which present themselves for consideration, in determining the validity and effect of the writing, seem to divide themselves into three distinct propositions:

1. The authority of the commissioners to enter into the agreement, or to accept one of its character?
2. If they might legally do so, is the agreement mutual, or the obligation to pay and to erect the building on the lot granted reciprocal?
3. Is there a sufficient consideration to support a promise?

The authority of the commissioners to erect the court-house is derived solely from the act of the 24th March, 1819. It is made their duty, by the second section of that act, to cause to be erected a suitable court-house in their county; and where the county funds are insufficient for that purpose, they are *required* to levy a tax, and collect it agreeably to the act creating a revenue for this State. They are also authorized by the same section to enter into contracts for the *erection* thereof, at any *regular* or *special* term of their court which they may appoint for that purpose. Have they pursued the powers thus granted to them?

Their authority would certainly seem to be confined, to entering into contracts with individuals, for the performance of the workmanship of the building, not for the purpose of raising a fund to defray the expense thereof, because such expense is to be paid out of the fund they are authorized to raise by taxation.

The law granting the power to erect the court-house, and making it compulsory on them so to do, gave the *only* power to raise the means to defray the expense thereof; and by so designating the power, would seem to exclude all other modes. It cannot be contended that the act has, in any of its parts, recognized the authority to receive gratuities or donations, for the purpose of forming a fund out of which the commissioners are to discharge the debts which they might incur for the erection of the building. It is true, they are nowhere forbidden, and although they might, with propriety, receive the donation of money for such an object, the inquiry, whether a court of justice can legally enforce such an obligation, where the court are not authorized by law to enter into one of such character, is certainly a very different question.

To show more clearly that the second section of the act could not possibly authorize an agreement of the present character, the power to enter into the contract is to be exercised only at a *regular* or *special* term of the county commissioners' court. Here, it is evident, from the terms of the agreement, that the commissioners did not conceive themselves acting under that section, nor even as a court.

If they had, they would most certainly have required the proposition to have been made at the sitting of the commissioners' court, and had it entered on their record ; but instead of that, it is a mere agreement with the commissioners by that name, and, really, one which they had no power to enter into out of court. The acceptance and assent of the commissioners to the agreement, is their own act, which in their character as commissioners, they had no power whatever to agree to, for it will not be denied, even admitting that they had no power in term time to agree, that out of term they have any authority to do any act whatsoever not expressly conferred on them by law. None having been conferred on them, it most clearly follows, that their act is altogether extra-judicial and void.

On the second point, the inquiry is presented, whether the agreement is mutual, or, in other words, whether the obligation to pay and to erect the building, is reciprocal. For the reasons already stated, it will be perceived that no obligation was imposed on the county to erect the building on the lot proposed, and that neither the commissioners in their official or individual capacity, nor the county, could in any way be rendered liable for a refusal to do it. The obligation is neither mutual nor reciprocal ; it is a promise by one party only. No engagement of any character whatever is made to erect the building. The act is altogether on one side. Reverse the case, and suppose an action brought against the county for not erecting the building, could it be insisted, that the county would have been at all liable for the assent of their commissioners under this agreement, if it were possible to suppose, from the writing, that such assent was given, and could it be liable even if agreed to, when the commissioners exceeded the powers and jurisdiction given to them by law ? Clearly not. It is certain that to every valid contract, there must be parties capable of contracting. Were the commissioners capable of contracting in the manner stated ? If not, then there is an end to the question. They could only contract in the manner authorized by law. This manner, most clearly, has not been pursued.

The law did not embrace the subject matter in the manner contracted for, if it be admitted that a contract was made, nor has the mode prescribed by law been observed. It therefore follows : first, that there is no evidence of a contract on the part of the county by their commissioners, and that therefore, there is no mutuality of consideration, which is necessary to every contract ; second, that the commissioners had no power to bind the county in such a contract, and that *they* were bound by law to erect a court-house.

Third, that a promise to them to pay money, for the performance

Randolph County v. Jones.

Gregg v. Philips.

of an act they were obliged to execute by law, in the faithful discharge of their official duties, is illegal and against public policy, and therefore void. To the third question, whether there is sufficient consideration to support a promise, it is not perhaps necessary to say more than this, that the act of erecting the court-house, which was a duty imposed by law, could not be a consideration to support a promise. The fact of its location near the lands of the defendant, is of course the only ground upon which it could be contended that a consideration could be raised, and even this vanishes when it is perceived that such a consideration is altogether equivocal and imaginary. It might or might not be of value to the defendant. No data can be assumed, by which it can be determined whether the erection of the building at the place proposed, could benefit the defendant one cent or 125 dollars, the amount of the subscription, nor whether it might not be an injury. It is not shown that any benefit has been experienced by the defendant from its location, nor injury sustained by the commissioners.

The consequences resulting from its location, may have been an injury to other portions of the inhabitants, and upon the ground of public policy, it is very questionable whether the court ought not to decide the contract void, for that reason alone.

I am of opinion that the present action cannot be sustained on the writing set forth, and that the agreement of the parties to discontinue the suit, be carried into execution.

Separate opinion by WILSON, C. J.—I concur in the opinion that the agreement of the parties to discontinue this suit be carried into execution, but my opinion is founded upon the single objection, that it does not appear that the contract upon which suit is brought, was entered into by the county commissioners, as a court; it is only in that character they are capable of contracting.

Judgment upon the agreement.

LOCKWOOD, J., gave no opinion.

T. Reynolds, for plaintiff.

D. J. Baker, for defendant.

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GREGG v. PHILIPS.

Breese R., 107.

Error to Monroe.

1. A debt due by one partner upon his individual account cannot be set off in an action to recover a debt due to the firm.
2. A payment to one partner is a valid payment to the firm upon a partnership credit.

SMITH, J.—This was an action of debt, on a sealed note, payable to James and Philips. Gregg, who was defendant in the court below, pleaded three pleas:

1. Payment generally.

2. That Philips and himself were mutually indebted to each other before the execution of the note; that prior to the making of the note, they attempted a settlement of their respective claims, but Gregg, being unable then to establish his against Philips, executed the note in question to James and Philips, who had become partners in trade, it being given for the amount of Philips' claim against him, leaving his, against Philips, unadjusted.

3. That the note was given to James and Philips, to secure a debt due to Philips only, and that before the commencement of the suit, he paid it to Philips.

To the first and third pleas, the plaintiff took issue, and demurred to the second; to which demurrer the defendant filed his rejoinder. The court below sustained the demurrer. On the trial, Gregg offered to give in evidence, an account of his against Philips, which existed, anterior to the making of the note given to James and Philips, which the court refused to permit.

To this decision an exception was taken. Two points are presented for the consideration of the court: First, that on the issues joined, it was competent for Gregg to give in evidence any debt due to him from Philips: Second, that the second plea was a bar to the action, and the demurrer should have been overruled.

We have no hesitation in saying that on both the points, the court below decided correctly. Nothing is better settled, than that debts to be set off must be mutual and between the parties to the record. If the issue on the third plea had been what the counsel for Gregg supposes it is, it might, perhaps, vary the question. But it will be seen that his allegation, that the consideration of the note was for a debt originally due to Philips *only*, is not noticed in the replication, and issue is taken on the single point of payment only. That part of his plea is treated as a nullity, and must be considered as surplusage. The only inquiry is, was the debt alleged to be due by Philips, a debt which could be set off.

The note is payable to co-partners, and the debt offered to be given in evidence, is due, if at all, by only one of the co-partners. The rule is, that a debt due individually by one co-partner cannot be set off in an action to recover a debt due the co-partnership. It is not a mutual debt, nor is it between the parties to the record. The offer, therefore, to prove a debt due by one of the co-partners, and that con

Gregg v. Philips.

Nomaque v. The People.

fessedly created before the making of the note, was foreign to the issue before the court. It was in no way pertinent thereto: it was not what the parties had made the issue, viz.: had Gregg paid the note to Philips, for a payment to one, was a payment to both, unless strictly forbidden. This reasoning is directly applicable to the second plea. It was not competent for Gregg to plead a state of facts, which in themselves amounted to no more than a right of setting off a debt due by Philips alone.

This plea was certainly not good, for he could not plead that, which in law, could be no defence. The court have examined the authorities quoted by the plaintiff's counsel to support the positions assumed by him, but they are found to be in no way analogous. The demurrer was properly sustained. The judgment of the court below must be affirmed, and the defendants in error recover their costs.

Judgment affirmed.



NOMAUQUE v. THE PEOPLE.

Breese R., 109.

Error to Peoria.

1. In a criminal cause, the indictment must be indorsed "*villa veri*," to authorize a trial.
2. In capital cases the prisoner stands upon all of his rights, and waives no irregularities because of his silence, nor can his counsel waive such rights without the consent of the accused.
3. A prisoner in a capital case has a right to be present when the jury render their verdict, in order to poll them, if he sees proper to do so.
4. If a juror swears, when called, that he had not formed an opinion, and it is afterward discovered that he had, this is a good reason why a new trial should be awarded the accused in a capital case.
5. *Quære*. May a jury separate, and the jurors go at large in a capital case, after being empanelled and sworn?

SMITH, J.—It appears from the record, that the plaintiff in error was tried at a Circuit Court at the November term, 1825, in the county of Peoria, on a charge of having murdered a man by the name of Pierre Londri. From an inspection of the record, it also appears that the indictment, as set forth, was never found by the grand jury of that county; no finding of any kind is made on the bill; it further appears, that on the 15th of October, 1825, being the day of the commencement of the trial, nine of the petit jurors were empanelled and sworn, and permitted to go at large until the next day, when the panel was completed. After the trial had closed, an agreement in the following words was entered into between the public prosecutor and the prisoner's counsel, viz.: "It is agreed by the attorney-general and the counsel for the defendant, that if, in case the jury should agree on their verdict, between this and to-morrow morn-

ing, that they may deliver their verdict to the clerk." In pursuance of this agreement, the clerk, on the morning of the 18th of October, 1825, as the record recites, presented to the court the following verdict, which had been handed him by the jury, viz:

State of Illinois, Peoria county Circuit Court, November term, 1825. We, the traverse jury, in and for the county aforesaid, do find Nomaque, an Indian of the Pottawattomie tribe, guilty of the murder of Pierre Londri, November 17, 1825.

A motion was thereupon made for a new trial, on the ground of partiality in Dumont, one of the jurors, who, as is established by the oath of two persons, declared before he was sworn on the jury, that Nomaque was a damned rascal, and all those who took his part, and he would give five dollars to H. M. Curry, to appear and assist to convict Nomaque of the crime charged, and pay it in surveying, or hunting land.

The court below refused to grant a new trial, and an exception was taken to that decision. There are other objections which were made on the trial of the cause, but as they are not deemed important, we pass them by. No exception is taken in this court, to the manner in which the proceedings come before the court, nor do we mean to say that any valid one could have been stated or urged.

From the preceding statement, which embraces, substantially, all the facts of importance in the case, the points which present themselves for consideration, are, first, whether the prisoner could have been legally tried at all in the court below, it not appearing that there had been a finding of the grand jury, on the paper purporting to be an indictment; and whether he can now avail himself of the objection in this court, the question appearing not to have been made in the court below. Secondly, whether permitting the nine jurors empannelled and sworn on the first day of the trial, to separate and go at large before the trial, would have formed sufficient cause for the Circuit Court to have arrested the judgment, or granted a new trial. Thirdly, whether the evidence offered to show that Dumont had, previously to the trial, expressed his belief of the guilt of the prisoner, or of his hatred to him, and was therefore not an impartial juror, was sufficient to establish either point, and authorize a new trial. Fourthly, whether the consent, that the jury might deliver their verdict to the clerk, could have been legally made by the prisoner's counsel; and whether that agreement dispensed with the personal appearance of the jury, and the rendering of their verdict in open court.

On the first point, we are of opinion, that it was necessary, in order

Nomaque v. The People.

to give the court the right to try the prisoner, that the grand jury should have indorsed their finding on the bill of indictment, verified by the signature of their foreman. This was indispensable, and as it appears not to have been done, the proceedings were *coram non judice*. This objection going to the power of the court to try the prisoner, on that indictment, may, although not noticed or urged below, be now urged as cause of error.

On the second point, we give no positive opinion, but it certainly was an act of great indiscretion in the court, to permit the jurors to go at large after they were sworn; because the reason of the rule, in keeping jurors together and apart from every other person, is as applicable, after they are chosen and sworn, and before the trial, as after they are charged with the prisoner. The object certainly is, to keep them from receiving any other impressions in regard to the prisoner, than those which shall be made by the testimony given on the trial; if suffered to go at large at any time after they are elected to try the prisoner, the object might be wholly defeated.

As to the third point, it is very apparent, that the prisoner has been tried by one, who, so far from standing perfectly indifferent between the parties, as the law emphatically requires, was in a condition the very opposite. The state of his mind must have led him to look on the testimony against the prisoner, with every view to a conviction, and his feelings, it would seem, could alone have been pacified with the surrender to him, by his fellow jurors, of his victim. We are, therefore, constrained to say, that the Circuit Court ought to have awarded a new trial on the production of the affidavits, as they show sufficient grounds discovered after the trial.

The fourth point is, we think, easily settled. The prisoner, in a capital case, must be considered as standing on all his rights. He cannot be considered as waiving anything, nor could his counsel do it for him. They possessed neither the power nor right, and if ever there was a case in which an observance of the rule should be required, the present is one. The case of *The People v. McKay*, 18 Johns. Rep., 212, is conclusive on this point. The Supreme Court of New York, in that case say, that a paper purporting to be a *venire*, but without the seal of the court, is a nullity, and they declared that the prisoner in that case, who had been convicted of murder, and although he had challenged some of the jurors, who had been summoned under the supposed *venire*, did not thereby waive his right to object to the want of a *venire*. It is further said in that case, "that it is a humane principle, applicable to criminal cases, and especially when life is in question, to consider the prisoner as standing on all his

rights, and waiving nothing on the score of irregularity"—and in that very case, the judge who delivered the opinion of the court relates a case analogous to the present. In Ontario county, New York, in 1814, a woman of color was indicted, tried, and found guilty of murder. The jury had separated after agreeing on a verdict, and before they came into court, and on that ground a new trial was granted, and she was tried again. On the present occasion, this precise point is not necessary to be decided. The agreement extends no further than to depositing the verdict with the clerk. It did not dispense with the personal appearance of all the jurors in court, and a rendition of the verdict by them. It can only be considered as authorizing the jury to separate when they agreed on their verdict until the next day, for their personal convenience. The prisoner had a right to have the jurors polled: this right could not have been exercised, where the presence of the jurors was dispensed with. For a confirmation of the soundness of this doctrine, see the case of Blackley v. Sheldon, 7 Johns. Rep., 32, and 6 Johns. Rep., 68, Root v. Sherwood, where it is said, "a verdict is not valid and final, until *pronounced* and recorded in open court; and before it is *recorded*, the jury may vary from their first offering of their verdict, and the verdict which is recorded, shall stand; and if the parties agree that a jury may deliver a sealed verdict, it does not take away the right of either to a public verdict." If this be law, in a civil case, is it not important, under our system of jurisprudence, that it should be adhered to in a criminal case affecting life? In the present case, the verdict was not even sealed; it was liable to alteration, and, besides, the court had no legal evidence that it was the verdict of the jury.

While on this part of the case, the court feel it their indispensable duty to reprobate the tolerance of a practice which might lead to the most dangerous consequences, in a case affecting the life of an individual, and to express their disapprobation of it, in the present instance.

The judgment of the Circuit Court of Peoria must be reversed, and a *supersedeas* awarded; and as a flagrant crime has no doubt been committed, and possibly by the prisoner, and in order that public justice may not be evaded, the court make this additional order, that the prisoner remain in custody for thirty days from this day (21st December instant), in order to enable the local authorities to take measures to bring him again to trial.

Judgment reversed.

H. Starr and D. Blackwell, for the plaintiff.

James Turney, Attorney General, for the defendants.

Duncan v. Morrison.

DUNCAN v. MORRISON.

Breese R., 113.

Appeal from Fayette.

1. Under the statute, it is error to enjoin more of a judgment at law than is shown by the bill to be unjust.
2. A party to negotiable paper cannot, at law or in equity, impeach it, except in cases of fraud, when sued by a *bonâ fide* holder.
3. Where a loss must fall upon either the maker or assignee of a note, natural justice points to the former as the one upon whom it should fall.
4. On a bill for an injunction against a judgment at law, it is error upon the dissolution of the injunction to render a decree for the amount of the judgment.

LOCKWOOD, J.—The bill filed by the complainant states, that he executed his note to M. Duncan, and that by inadvertence or mistake, it was omitted to be inserted in the note, that it was to be paid in "State paper," although it was agreed by the parties, that it was to be discharged in that currency: The bill also states, that before the note became due, it was assigned to Morrison, who has brought suit, obtained judgment, and intends to exact specie. There is no allegation of fraud on the part of M. Duncan, or notice to Morrison that it was to have been paid in State paper. On this bill, an injunction was granted, and subsequently, dissolved in the Circuit Court of Fayette county, and a decree rendered against complainant and his security in the injunction bond, for the whole amount of the debt, together with six per cent. damages and costs, and the bill dismissed. To reverse this judgment, an appeal has been brought to this court.

The injunction granted in this case was clearly wrong. It ought only to have been allowed for such portion of the judgment, as the complainant showed by his bill to have been unjust. (Laws of 1819, page 173.) The bill is also defective, in not showing the value of the State paper, and the extent of the discount he claimed. But the main question is, whether such a case is presented by the bill, as to call for the equitable interference of a court of chancery? Morrison, in this case, is to be viewed as the innocent indorsee for a valuable consideration. Can such a negotiable instrument, where there is no fraud, be impeached, either at law or in equity? This question must depend upon the nature of such instruments, and our statutes making them negotiable. A party, when he subscribes his name to such instruments, knows, that by the law, he authorizes the payee to sell it to whomsoever will buy, and the purchaser has a right to believe, from the act of the maker, that there exists no latent equity to prevent a recovery of the full amount. If either drawer or indorser is to suffer under such circumstances, which of these parties does natural equity point out, as the proper party? We have no hesitation in

saying, that if a loss is to be sustained in this case, that equity would decide that it ought to fall on the maker of the negotiable instrument. But in this case the court is not left to speculation to settle the merits of the cause. The statute making notes, etc., negotiable, declares, that the sum of money mentioned therein shall be due and payable to the person to whom the said note, etc., is made, and that the indorsement shall absolutely transfer and vest the property thereof in the assignee. The second and third sections of the act point out the cases where the maker can defend, as against the indorsee. The complainant has not brought himself within either of these provisions. It is hardly to be presumed, if the legislature, while they were legislating on this subject, had believed that a latent equity, as between maker and indorsee, ought to be a defence between them, but that they would have so declared. Nor does this case come within the provisions of the act to regulate the practice in certain cases; because here was not either a total want of consideration, or a total, or partial failure of consideration. Whether on a total want of consideration, or a failure of consideration of a negotiable note, such facts can be set up as a defence, the court are not called on to give an opinion, nor do they intend to do so.

The court are, therefore, of opinion, that the injunction was rightly dissolved, and the bill properly dismissed, and affirm the decree so far, and for costs of the suit.

With regard to the construction of the 17th section of the act regulating the practice of courts of chancery, the court have met with considerable difficulty; but as the counsel for Morrison appeared willing, on the argument, that the decree for the amount of the former recovery, together with the six per cent. damages, should be reversed, it is deemed unnecessary, at this time, to settle the true construction of the statute, except, that the court are clearly of opinion that the decree for the amount of the judgment at law is erroneous. The court further order, that the decree be reversed as to the former judgment, and the six per cent. damages, and that each party pay one half of the costs of this appeal.

Decree partially reversed.

D. Blackwell, for appellant.

Baker, for appellee.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN JUNE TERM, 1826.

PRESENT :

WILLIAM WILSON, CHIEF JUSTICE.,
THOMAS C. BROWNE, } ASSOCIATE JUSTICES.
SAMUEL D. LOCKWOOD, }
SMITH, JUSTICE, was absent during the whole of this term.

COLES v. MADISON COUNTY.

Breese R., 115.

Error to Madison.

1. The legislature have absolute power over counties, and may release a penalty due a county after verdict and before judgment.
2. Such legislation does not partake of the character of *ex post facto* laws, nor does it impair the obligation of a contract.
3. The release may be pleaded *puis d'arrien continuance*.

WILSON, C. J.—This is an action of debt brought by the county commissioners of Madison county, for the use of the county, against Edward Coles, for \$2,000, as a penalty for bringing into the county and setting at liberty ten negro slaves, without giving a bond, as required by an act of the legislature of 1819. To this action Coles pleaded the statute of limitations, which plea was demurred to, and the demurrer sustained by the court, and the parties went to trial upon the issue of *nil debit*. A verdict was found against Coles at the September term, 1824, of the Madison Circuit Court, but no judgment was rendered upon it till September, 1825, the cause having been continued till that time, under advisement, upon a motion for a new trial. In January, 1825, the legislature passed an act releasing all penalties incurred under the act of 1819 (including those sued for), upon which Coles was prosecuted.

This act Coles plead *puis darrien continuance*, and renewed the motion for a new trial, but the court overruled the motion, and rejected the plea, and rendered judgment for the plaintiffs.

There are several causes assigned for error, but the one principally relied upon is, that the court rejected the defendant's plea (as a bar to the further prosecution of the suit), alleging a compliance on his part with the act of January, 1825.

The only question for the decision of the court from this statement of the case is, was the legislature competent to release the plaintiff in error from the penalty imposed for a violation of the act of 1819, after suit brought, but before judgment rendered; or, in other words, could they, by a repeal of the act imposing the penalty, bar a recovery of it. If the legislature cannot pass an act of this description, it must be because it would be in violation of that provision of the Constitution of the United States (and which has in substance been adopted into ours), which denies to the State legislatures the right to pass an *ex post facto* law, or law impairing the obligation of contracts. This is the only provision in that instrument that has any bearing upon the present question.

Is the law of 1825, then, an *ex post facto* law, or does it impair the obligation of a contract? The term *ex post facto* is technical, and must be construed according to its legal import, as understood and used by the most approved writers upon law and government. Judge Blackstone says, "An *ex post facto* law is where, after an action (indifferent in itself) is committed, the legislature then, for the first time, declare it to have been a crime, and inflict a punishment upon the person who committed it." This definition is familiar to every lawyer, and I am not aware of any case in either the English or American courts in which its correctness is denied.

It appears from the *Federalist*, a work that has been emphatically styled the text-book of the Constitution, that the term was understood and used in this sense by the framers of that instrument. The authors of this work were among the ablest statesmen and civilians of the age—two of them were members of the convention that framed the constitution, and would not have been mistaken in the meaning of the terms used in it. Judge Tucker, in his notes on the commentaries of Blackstone, also adopts it as the true one; and it is evident from the tenor of his comments upon the principles contained in that work, that if there had been any doubt of the correctness of this one, that it would not have been passed in silence, much less would it have received his approbation.

But that the term *ex post facto* is applicable only to laws relating

to crimes, pains, and penalties, does not rest upon the bare acquiescence of the courts, or the authority of elementary writers. It has received a judicial exposition by the highest tribunal in the nation. The decision of the Supreme Court of the United States, in the case of *Calder and wife v. Bull and wife*, 3 Dallas, 386, must be considered as having put this question to rest. The point decided in that case was as to the validity of an act of the legislature of Connecticut, which had a retrospective operation, but which did not relate to crimes. All the State courts through which that case passed decided in favor of the validity of the law. It was then taken up to the Supreme Court of the United States, where the judgment was affirmed. That court was clearly of opinion that the prohibition in the United States constitution was confined to laws relating to crimes, pains, and penalties. Judge Chase, in delivering his opinion, says, "Every *ex post facto* law must, necessarily, be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited by the Constitution." Patterson, Justice, said "he had an ardent desire to have extended the provision in the Constitution to retrospective laws in general," and concludes his remarks by saying, "But on full consideration, I am convinced that *ex post facto* laws must be limited in the manner already expressed."—(Sergeant's Constitutional Law, 347.) No higher evidence, I believe, can be adduced of the existence of any principle of law than is afforded by these authorities, that the law under consideration is not an *ex post facto* one. It is considered that it is retrospective, and that, as a general principle of legislation, it is unwise to enact such laws; yet it is not the province of a court to declare them void. No prohibition to the exercise of such a power by the legislature is contained in the Constitution of the United States or of this State, and it is an incontrovertible principle that all powers not denied them by one or other of those instruments, are granted. The next inquiry is, Does this law violate the obligation of a contract?

This question is easily answered. A contract is an agreement between two or more, to do or not to do a particular act; nothing like this appears in the present case. If a judgment had been obtained, the law might, by implication, raise a contract between the parties; but until judgment, the defendant is regarded as a *tort feasor*; he is prosecuted upon a penal statute for a *tort*: the action would die with him, which would not happen in the case of a contract. It is idle, therefore, to talk of a contract between the plaintiff and defendant, and it is only between the contracting parties that the legislature is prohibited from interfering. But in this case there is no contract

between any parties, and all reasoning founded upon the idea of a contract is nugatory. But it is said the legislature could not pass this law, because the plaintiffs have acquired a vested interest in the penalty by commencing suit, which cannot be taken away.

The authorities relied upon to support this position, are not apposite. The decisions in those cases, turned on the construction of the laws, and not on the authority of the legislature to pass them. In the case of *Coleman v. Shower* (2 Show.), which was an action brought after the passage of the statute of frauds and perjuries, upon a marriage promise made by parole, the judges said, they believed the intention of the makers of that statute was only to provide for the future, and not to annul parole promises which were good and valid in law, at the time they were made. In the case of *Couch qui tam v. Jeffries* (4 Burrow, 2460), Lord Mansfield placed his opinion on the intention of the legislature, which he believed, was not to do injustice to the plaintiff, by subjecting him to costs. So, too, in *Dash v. Van Kleeck*, 7 Johns., 577, the same ground was assumed. The court did not intend to decide that the legislature could not pass a retrospective law, but that the one under consideration was not necessarily retrospective, and therefore ought not to receive that construction. In this opinion, the court was divided three to two. But had the plaintiffs a vested interest in the penalty before judgment? A vested right is one perfect in itself, and which does not depend upon a contingency, or the commencement of suit. Suit is the means of enforcing, or acquiring possession of a previously vested interest, but the commencement of suit does not of itself, even in a *qui tam*, or popular action, vest a right in the penalty sued for. The only consequence that results from the commencement of a popular action, is, that it prevents another person from suing, and the executive from releasing the penalty. Blackstone (vol. ii., p. 442), in speaking of the means of vesting a right in chattel interests, says, "and here we must be careful to distinguish between property, the right of which is before vested in the party, and of which only possession is recovered by suit or action, and property, to which a man before had no determinate title, or certain claim, but he gains as well the right, as the possession by the process and judgment of the law. Of the former sort, are debts and choses in action." In these cases the right is vested in the creditor by virtue of the contract, and the law only gives him a remedy to enforce it. "But," continues he, "there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law, where before judgment had, no one can say he has any absolute property,

Coles v. Madison County.

either in possession or in action; of this sort are, first, such penalties as are given by particular statutes, to be recovered in an action popular." Here is an authority directly in point. In the present case no judgment had been rendered previous to the passage of the law releasing the penalty, consequently, no right to the penalty had vested in the plaintiffs, which this law directs. The right which the plaintiffs had acquired by the commencement of the suit, was, according to Blackstone, "an inchoate, imperfect degree of property," which required the judgment of the court to consummate, and render it a vested right. Before judgment in a popular action, the property in the penalty is imperfect and contingent, liable to be destroyed by a repeal of the statute upon which suit is brought. This principle is settled in a variety of cases; in that of *Seaton v. The United States*, 5 Cranch, p. 283, Judge Marshall in delivering the opinion of the court, says, "That it has been long settled upon general principles, that after the expiration or repeal of a law, no penalty can be imposed or punishment inflicted, for violations of the law committed while it was in force," The same point was decided in the case of the *Schooner Rachael v. The United States*, 6 Cranch, 329; and in the case of the *United States v. Ship Helen*, 6 Cranch, 203, the doctrine is fully settled, that, even after judgment of condemnation *in rem* for a breach of the embargo laws, provided the party appeals, or obtains a writ of error, he may avail himself of a statute repealing the penalty enacted subsequent to such condemnation. In *The People v. Coleman*, the court unanimously awarded a new trial, in order that the defendant might avail himself of a defence given by a statute passed subsequent to the commission of the offence; and in the case of the *Commonwealth v. Duane*, 1 Binney, 601, the defendant had been indicted at common law for a libel: after verdict, and before judgment, the legislature passed a law, that "after the passage of this act no person shall be prosecuted criminally for a libel." The Supreme Court refused to give judgment on the verdict. The terms of this act were not retrospective, yet the court considered it so, and must necessarily have acknowledged the power of the legislature to pass such laws. (See also, *Sergeant's Constitutional Law*, 348, 1 Cranch, 109, and 3 Dall., 279.) These cases require no comment. They are directly on the point under consideration, and have settled the doctrine, that a repeal of a law imposing a penalty, after verdict for the penalty, is a bar to a judgment on the verdict. The court has no longer any jurisdiction of the case. There is no law in force upon which they can pronounce judgment. If then, the legislature can, by a total repeal of the law of 1819, defeat a recovery for an infraction

of it before judgment, can they not by the act of 1825, release all penalties incurred anterior to its passage? There is no rule of law which denies them the power of doing that indirectly, which they may do directly. In effect and in principle, there is no difference, and the power to do the greater act, includes the less.

It is said that the king cannot remit an informer's interest in a popular action after suit brought; this is no doubt true, but it is equally true, that the parliament can. It is not pretended that the executive could remit the penalty in this case, but that the legislature may. Neither the Constitution of the United States, nor of this State, contains any prohibition to the exercise of such a power by the legislature, and their powers have no limits beyond what are imposed by one or other of those instruments, nor is it necessary that they should. They form an ample barrier against tyranny and oppression in every department of the government, and secure to the citizens every right in as perfect a manner as is compatible with a state of government. If they should, by mistake, or any other cause, attempt the exercise of a power incompatible with the Constitution, the obligation of a court to resist it, is imperative. But "it is not in doubtful cases, or upon slight implications that the court should pronounce the legislature to have transcended their powers." In the present case, I am clearly of opinion, they have not done so. The law under consideration is not an *ex post facto* law, because the generally received, and well-settled import of the term, is not applicable to a law of this character. It impairs the obligation of no contract, for the conclusive reason that no contract ever existed, and for the same reason, it cannot be said to destroy a vested right. 2 Dall., 304; 1 Cranch, 109.

The objection that this law works injustice to the county, is not well founded. All the rights of the county contemplated to be secured by the law of 1819, are secured by this.

The object of the law of 1819, was to compel persons bringing slaves into this State for the purpose of emancipation, to give bond for their maintenance. This law requires the bond to be given, which has been done, and all costs of suit, and damages incurred in any case to be paid, which the defendant has also offered to do in this case. The county, then, is secured, not only against prospective injury, but against all damages heretofore sustained. There is no ground of complaint, then, on the part of the county; they are secured in their rights and lose nothing. In another point of view which this case is susceptible of, I am satisfied that the law under consideration is not unconstitutional. On an inquiry into the different kinds of corporations, their uses and objects, it will appear that a

Coles v. Madison County.

Snyder v. State Bank of Illinois.

plain line of distinction exists between such as are of a private, and such as are of a public nature, and form part of the general police of the State. Those that are of a private nature, and not general to the whole community, the legislature cannot interfere with. The grant of incorporation is a contract. But all public incorporations, which are established as a part of the police of the State, are subject to legislative control, and may be changed, modified, enlarged, restrained, or repealed, to suit the ever varying exigencies of the State. Counties are corporations of this character, and are, consequently, subject to legislative control.

Were it otherwise, the object of their incorporation would be defeated. It cannot be doubted, that Madison county, as a county, might be stricken out of existence, and her interest in a popular action thereby defeated. Upon what principle, then, can it be contended, that the legislature cannot remit a penalty in a popular action brought for her benefit. Every view I have been able to take of this interesting and important subject, leads to the conclusion that the legislature have the constitutional power to pass the act of 1825, releasing Coles, upon the terms prescribed in that act.

The judgment of the court below must be reversed, and the proceedings remanded, with directions to the Circuit Court to receive the defendant's plea upon his paying costs, etc.

Judgment reversed.

Starr, for plaintiff in error.

Turney and Reynolds, for defendant in error.

LOCKWOOD, J., having been of counsel, did not sit in the cause.

SNYDER v. STATE BANK OF ILLINOIS.

Breese R., 122.

Appeal from St. Clair.

1. The old State Bank of Illinois, when it issued its notes, which were alleged to be bills of credit, can recover from one of their borrowers, though their charter is unconstitutional.
2. A promissory note is *prima facie* evidence that the maker borrowed money from the payee.
3. A *scire facias* to foreclose a mortgage, reciting a note of \$760, is *prima facie* evidence that money was loaned by the payee to the maker.
4. Judgment will be rendered against the party to a suit who commits the first error in pleading.

LOCKWOOD, J.—The plaintiffs below brought a *scire facias* in the St. Clair Circuit Court, on a mortgage, executed to them under the act incorporating the State Bank. The defendant below pleaded that the consideration of the mortgage was the paper of the State Bank, and

Snyder v. State Bank of Illinois.

Rankin v. Beaird.

that the incorporation of said bank was in violation of the Constitution of the United States, and that therefore he is not bound to pay said mortgage. To this plea, the plaintiffs below demurred. The Circuit Court sustained the demurrer, and rendered judgment for the amount due on the mortgage. From which judgment the defendant below has appealed to this court.

The errors assigned are: 1, That the incorporation of the bank, and issuing the paper, are contrary to the Constitution of the United States; 2, That there is no averment of money received by Snyder; 3, That there is no breach set out in the *scire facias*. As to the first point, the court are of opinion that the debtors of the bank cannot raise the objection that the charter of the bank is a violation of the Constitution. After having borrowed the paper of the institution, both public policy and common honesty require, that the borrowers should repay it. It is, therefore, unnecessary to decide whether the incorporation of the bank was a violation of the Constitution or not. As to the second assignment of error, the court are of opinion that the averment, that Snyder made his note to plaintiffs for \$760, is sufficient to show that he borrowed, and received that amount.

The court, however, are of opinion that no breach has been assigned, and that the plaintiffs below by demurring to defendant's plea, have opened the pleadings, so as to authorize the court to decide who committed the first error. For want, then, of a sufficient assignment of a breach of the note or mortgage, the judgment must be reversed, with costs, and the cause remanded, with directions to permit an amendment of the *scire facias*, etc.

Judgment reversed.

Reynolds, for appellant.

Cowles, circuit attorney, for appellees.



RANKIN v. BEAIRD.

Breese R., 123.

Error to St. Clair.

Where a statute provides that a forger shall be convicted, *finéd*, and that one-half of the penalty shall go to the person whose name is forged, the legislature has power to release the penalty.

WILSON, C. J.—This action is brought against Beaird, as sheriff of St. Clair county, for \$1,000, for the escape of William D. Noble, who was committed to his custody upon a conviction of forgery, at the May term of the Circuit Court of St. Clair county, by which he attempted to defraud Rankin of \$1,000. The judgment of the court

Rankin v. Beaird.

Gilham v. Cairns.

was, that he should be fined \$2,000, one half to Rankin, and stand committed till the fine and costs were paid. In January, 1823, the legislature passed an act requiring the sheriff of St. Clair county, who was Beaird, the defendant in error, to discharge Wm. D. Noble out of custody, which he accordingly did. On the trial of this cause, Beaird, pleaded the act aforesaid in bar of the action, to which plea Rankin demurred, and the demurrer was overruled by the court, and judgment rendered for defendant. It is said that the statute relied upon by Beaird, is unconstitutional, because by discharging Noble out of custody, it destroyed a vested interest which Rankin had in the judgment against him. It is unnecessary to inquire what interest Rankin had in the fine imposed on Noble, because, whatever he originally had in that, he has yet. It would be absurd to contend that he had a vested right in his imprisonment, and this act has no other effect than to discharge him from imprisonment.

It may be questioned whether Rankin had any vested interest in the fine, till it was collected; but if it is admitted that he had, this act does not destroy it, but leaves him to his action. See the authorities referred to in the case of the County Commissioners v. Coles, to which this is in some respects analogous.

The judgment of the court below is affirmed.

Judgment affirmed.

Blackwell, for plaintiff in error.

T. Reynolds, for defendant in error.

GILHAM v. CAIRNS.

Breese R., 124.

Appeal from Monroe.

1. As to who are proper parties to a bill in chancery, is discretionary with the Circuit Court.
2. All parties in interest should ordinarily be made parties.
3. But when a party in interest is omitted, some reason ought to be shown for the omission in the bill itself.

Lockwood, J.—This was an appeal from the Monroe Circuit Court, sitting as a court of chancery, on a bill filed against the heirs of Gilham, deceased, for a specific performance of a contract executed by their ancestor to one Jacob A. Boyce, for the conveyance of a tract of land lying in Monroe county. The third error assigned, is the want of proper parties to the suit, inasmuch as Boyce should have been a plaintiff or defendant, his interest being affected by the decree. The omission to make Boyce a party, is clearly erroneous. 2 Bibb's Rep.,

Gilham v. Cairns.

Betts v. Francis.

316, 184. There is, no doubt, some discretion vested in a court of chancery as to whom must be made parties, but where a court of chancery is called upon to dispense with the proper parties, some reason ought to be disclosed in the bill. In this case, for aught that appears, Boyce is alive, or if dead, has left heirs capable of protecting their rights. The court ought not to exercise a discretion in dispensing with parties who are interested, without sufficient cause being shown. For this cause, the decree must be reversed with costs. The court are also of opinion that costs ought not to have been decreed against the defendants, admitting the decree to have been correctly made, as it does not appear that the defendants have ever refused to convey the premises, or that they have ever been requested to do it.

The court see no objection to the Circuit Court of Monroe county entertaining jurisdiction in this case, but on the contrary, they think there is a manifest propriety that the suit should be instituted there. They formed this opinion upon the effect given to decrees in chancery, by the 14th section of the act regulating the practice in chancery.

The other errors assigned, do not appear to be of sufficient importance to require an examination by this court. The decree of the Circuit Court is reversed with costs, and the case remanded with permission to amend the bill by constituting Boyce a party.

Decree reversed.

Starr, for appellants.

T. Reynolds, for appellee.



BETTS v. FRANCIS.

Breese R., 125.

Error to Randolph.

1. In an action of *assumpsit* for money had and received, a plea of payment is valid; but a *similiter* to the plea is illegal, and the judgment in behalf of the plaintiff will be reversed.
2. No intendment will be made in behalf of the verdict and judgment below where the record contradicts the ordinary presumption.

THIS was an action of *assumpsit* for money had and received, etc., brought by the defendants in error, as administrators of M. Johns, deceased. The defendants below pleaded *non assumpsit*, and payment, without concluding the plea with a verification, simply stating, that the intestate in his lifetime had fully paid and satisfied, etc. Issue was joined upon the first plea, and to the plea of payment, the plaintiffs added a *similiter*. Jury, and verdict, and judgment, for

Betts v. Francis.

Beaugenon v. Turcotte.

the plaintiffs below. To reverse that judgment, a writ of error was prosecuted to this court.

LOCKWOOD, J.—Several errors have been assigned in this cause which do not appear to merit consideration, except the fourth, which is, “That no issue was joined on the plea of payment.” The words, “and the plaintiff doth the like,” cannot be taken as a traverse of a plea of payment. 1 Littell’s Rep., 64.

A plea of payment is a good plea in an action of *assumpsit*, in order to enable the defendants to set off any demand they may have against the plaintiffs; and without such a plea, evidence of counter demands could not be received.

From the record this court cannot intend that the defendants were permitted to give evidence under the plea of payment. The judgment must therefore be reversed with costs, and the cause remanded with permission to the parties to amend their pleadings in the court below.

Judgment reversed.

T. Reynolds, for plaintiffs in error.

Starr, for defendants in error.

BEAUGENON v. TURCOTTE.

Breese R., 126.

Appeal from St. Clair.

1. A party who seeks equity must do equity.

2. If a party has a defence at law, and falls to avail himself of it, he cannot be relieved in equity.

LOCKWOOD, J.—This is an appeal from the equity side of the Circuit Court of St. Clair county. The bill filed in this cause, alleges that the appellant when he executed the note, was deceived as to the kind of money in which it was payable, and was also deceived as to the language in which it was written. When the appellant executed the note, neither Turcotte, nor his agent, was present, and there is no ground to charge either of them with any knowledge that any fraud or misrepresentation had been used in obtaining appellant’s signature to the note. The court below, however, acting under the impression that the appellant supposed, that in executing the note, he had made himself liable only to pay its amount in State paper, have reduced the judgment to the value of State paper at the time it became due. This is all that justice requires, for the appellant was willing, and agreed, according to his own showing, to become the surety of Valois

for the amount of the note in State paper. It, perhaps, might well be doubted, whether the testimony was altogether sufficient to establish the fact, that any imposition was practised, in obtaining the appellant's signature to the note. But the court do not intend to disturb the decree of the court below, as we are satisfied, that the appellant has received all the relief that he is entitled to, upon the most favorable view of the case. It is a well-settled principle in equity, that a party who seeks relief in a court of chancery, must first do equity. In this case, neither Turcotte nor his agent, practised any fraud or deception. Turcotte was delayed in collecting his debt against Valois, in consequence of the appellant's signature being by him affixed to the note, and the bill acknowledges his willingness and agreement to execute the note, supposing it to be payable in State paper. It is, then, no more than equitable that he should pay the value of State paper when the note became due. The imposition supposed to have been practised, in representing the note to have been written in English, could produce no injury; the real imposition, if any, consisted in representing the note to be payable in paper instead of specie, for which relief has been granted. Strong doubts are entertained by the court, whether the appellant was entitled to any relief. The object in a court of law, in serving the process on the party, and filing a declaration ten days before court, is to apprise the defendant of the precise nature of the appellant's demand against him, and if the defendant neglects to avail himself of the means thus furnished him, of ascertaining the cause of bringing the suit, courts of equity will seldom interfere to protect parties from the effects of such negligence, when the defence is a legal one. The authorities to this point are numerous. 1 Bibb., 173; 2 Bibb., 192.

Chancellor Kent, in delivering his opinion in the case, *Duncan v. Lyster*, 3 Johns. Ch. Rep., 356, says, "It is a settled principle, that a party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report by facts, or on grounds of which he could not have availed himself, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." As Turcotte has not appealed, and as the court are satisfied, although the testimony is loose, that justice has been done, they will not disturb the decree, as pronounced in the court below. The decree must be affirmed with costs.

Decree affirmed.

Blackwell, for appellant.

Starr, for appellee.

Kimmel v. Shultz.

KIMMEL v. SHULTZ.

Breese R., 128.

Error to Jackson.

1. Action against several joint debtors—judgment must be rendered against all or none, unless a defence, personal to one of the defendants, is interposed, such as bankruptcy, infancy, coverture, or the like.
2. Under the Constitution of the United States, a judgment rendered in a sister State is to be regarded in the same light, when properly authenticated, as though it had been rendered in the State where it is to be enforced.
3. The transcript of a judgment rendered in a sister State is no part of the record in our Appellate Court, unless made so by a bill of exceptions.

Lockwood, J.—This is an action of debt brought on a judgment obtained in the State of Pennsylvania against the plaintiff in error, and Henry G. Pius and Henry A. Kurtz. The writ and declaration in this suit are also against all of the judgment debtors, but this judgment is rendered against Kimmel only. It appears from the sheriff's return, that the writ was executed on all the defendants, and no reason is assigned why the judgment was not rendered against the whole.

Several errors have been assigned, but it will be unnecessary to take notice of more than the second error, which is, that judgment was given against Kimmel on the plea of *nul tiel record*. This was clearly erroneous. The rule is well settled, that where a suit is brought against several joint debtors, you must recover against all the defendants or none, unless one or more of the defendants interpose a defence which is personal to himself, such as infancy or bankruptcy. *Robertson v. Smith* and others, 18 Johns. Rep., 459.

In this case, it does not appear that Pius and Kurtz made any defence; consequently, judgment ought to have been taken against them by default. The judgment, for this error, must be reversed with costs, and the cause remanded, with liberty to both parties to amend their pleadings.

As difficulty may arise in the further prosecution of this suit, the court think proper to remark, that according to the decision of the Supreme Court of the United States, in the case of *Mills v. Duryee*, 7 Cranch, 481, the plea of *nil debet*, is not a good plea in an action of debt founded on a judgment recovered in any of the courts of the several States, and upon the principles assumed in that case, the third plea would be bad. Such judgments, according to that case, are to be regarded in the same light they would have been, had they been sued upon in the courts of the State where they were originally recovered. No other defence can here be made but what could have been made in Pennsylvania, and if the common law doctrine in relation to judgments prevails in that State, the question in relation

Kimmel v. Shultz.

Wright v. Armstrong.

to the partnership of Kimmel, Pius and Kurtz, must be considered as conclusively settled, so far as regards this suit, by the judgment in Pennsylvania.

The decision, in the case of *Mills v. Duryee*, has, by courts of great respectability, in several of the States, been regarded as a harsh decision, and may lead to many oppressive consequences if adopted in extenso. The court, in delivering that opinion, seemed to be aware that there was a description of judgments, such as judgments obtained on attachments without notice, that ought to be an exception to their rule, and they appear to lay stress on the fact, that, in the case under consideration, the defendant *had notice and appeared in the suit*.

It is therefore suggested by the court to the counsel for the defendants in error, whether it ought not to appear from the declaration, what the notice in the original suit was, and what is the effect of the judgment in Pennsylvania. The laws of the several States are to be considered as facts, and in general, like other facts, ought to be averred and proved. If the law, however, presumes that the judgment was obtained upon sufficient notice of the pendency of the suit, it would probably be proper for the defendant, by plea, to allege such facts as would be sufficient to show that the judgment ought not to be clothed with its conclusive character as at common law.

The court would also remark, that in case this suit should be brought again before them, in regard to the effect and nature of the record produced in evidence, that the record ought to be brought up by a bill of exceptions. As it is presented to them in this case, they could not notice it. From anything that appears on the record, it was received as evidence in the court below, without objection.

Eddy, for plaintiff in error.

Cowles, for defendants in error.



WRIGHT v. ARMSTRONG.

Breese R., 130.

Error to Madison.

To sustain an action of replevin, the taking of the defendant must be unlawful, from the actual or constructive possession of the plaintiff.

Judgment reversed.

Starr and *Cowles*, for plaintiff.

D. Blackwell, for defendant.

Baker v. Whiteside.

BAKER v. WHITESIDE.

Breese R., 132.

Appeal from Madison.

1. Oral evidence to change the *terms* of a contract is inadmissible.
2. But the time within which the contract is to be performed may be extended by *parol*.
3. A vendee of real property must demand of the vendor a deed of conveyance, in order to put him in default.

WILSON, C. J.—This is an appeal from the Madison Circuit Court, in an action of covenant on a writing obligatory, executed by S. Whiteside to A. Baker, in the penalty of \$200, that if he, the said Baker, should pay to the said Whiteside \$125 on or before the first day of October next ensuing, he, the said Whiteside, would execute and deliver to the said Baker a deed in fee simple for a lot in the town of Edwardsville.

Baker avers in his declaration that he did pay the sum of \$125, according to agreement; nevertheless, the said Whiteside did not, on the first day of October, or at any time before or since, execute and deliver to the said Baker a good and sufficient deed, although often requested so to do. To this declaration the defendant pleaded two pleas:

1. That the plaintiff made no demand of the said defendant for the deed specified, and that the said defendant was always ready and willing to execute the same.

2. That the said defendant offered to make the deed according to his covenant, and the said plaintiff objected, and said when he wished the deed he would apply for it.

Both these pleas are demurred to, and the question presented for our determination is, whether or not the court below erred in overruling the demurrers.

As the second plea presents the strongest ground of defence, we will consider it first. If it is a correct principle of law, and that it is the court is fully satisfied, that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned, the demurrer was correctly overruled. The plaintiff's conduct can be considered in no other light than a waiver of the condition of the bond so far as related to the time of its performance. As a general rule, it is true that the terms of a written agreement cannot be changed by *parol*, but that the *time* of its performance may be extended, is settled by a variety of cases; that of *Keating v. Price*, 1 Johns. Cases, 22, is directly in point. In that case the defendant promised in writing to deliver a quantity of staves on or before the first day of May, 1796. The defendant on the trial proved that in

Baker v. Whiteside.

State Bank v. Buckmaster.

January, 1796, the plaintiff agreed to extend the time until the spring following. The court said that an extension of time may often be essential to the performance of contracts, and there can be no reason why a subsequent agreement for that purpose should not be valid, and proved by parol evidence.

The first plea, the court is of opinion, is also good. According to the true construction of the contract, no time is fixed for executing and delivering the deed; a demand by the plaintiff was therefore necessary, and as no such demand is averred specially, the demurrer to the plea was correctly overruled. The judgment of the court below is affirmed, and the cause remanded, with leave to the plaintiff to withdraw his demurrer and take issue on the pleas filed.

Judgment affirmed.

Starr, for appellant.

Cowles, for appellee.



STATE BANK v. BUCKMASTER.

Breese R., 133.

Error to Madison.

In *sci. fa.* to foreclose a mortgage, while the writ ought to run in the name of the "*People of the State of Illinois*," as provided in the constitution, if these words are omitted, it will be regarded simply as a *misprision* of the clerk, and may be regarded as amendable on motion; and if no motion is actually made, the Appellate Court treat the omission as supplied by an amendment.

THIS was a *scire facias* brought by the plaintiffs in the Circuit Court of Madison county, against the defendant, then sheriff of said county, to foreclose a mortgage executed by him to the State Bank. A motion was made by defendant's counsel, to dismiss the suit, on the ground of irregularity in the *scire facias*, the words, "the people of the State of Illinois to the coroner of Madison county," having been omitted. A motion was also made by the plaintiffs' counsel to amend the *scire facias*, which the court overruled, and sustained the motion of defendant, to dismiss. The errors assigned are, in dismissing the *scire facias*, and in disallowing the amendment.

Opinion of the Court by Justice Lockwood.—The only question submitted in this case is, whether the court ought to have suffered the amendment asked for. The mistake committed in the *scire facias*, is clearly a clerical error, and upon the principle assumed by late cases, that the court will amend all such errors, the court below ought to have permitted it. The mistake in this case, could not lead to any misapprehension, or in the least tend to surprise the party.

State Bank v. Buckmaster.

Reynolds v. Mitchell.

Hays v. Thomas.

The doctrine of amendments is well calculated to advance justice and prevent delay. The constitution requiring that writs, etc., shall run "in the name of the people of the State of Illinois," seems to be directory to the clerk, or person issuing the process, and the omission of the words, is a mere misprision of the clerk, and ought not to work an injury to the plaintiffs. The court, therefore, erred in dismissing the *scire facias*, and entering judgment against plaintiffs for the costs. The judgment is reversed with costs, and the cause remanded to the Circuit Court of Madison, for further proceedings.

*Judgment reversed.**Cowles*, States' attorney, for plaintiffs in error.*J. Reynolds*, for defendant in error.

REYNOLDS v. MITCHELL.

Breese, R., 135.

Appeal from St. Clair.

1. WHERE a justice of the peace renders a judgment for more money than is due to the plaintiff, the remedy of the defendant is by appeal and ^{not} by bill in equity.

2. Where no equity appears ^{upon} ~~before~~ the face of a bill in chancery, the court may dissolve an injunction improvidently issued and dismiss the bill, whether all of the defendants have answered or not.

*Decree affirmed.**Cowles*, for appellant.*Blackwell*, for appellee.

HAYS v. THOMAS.

Breese R., 136.

1. According to the rule of the civil law, the father and mother are related to their children in the first degree.
2. By the same principle of computation, the brothers and sisters are related in the second degree.
3. By the rule of the civil law, the mother (the father being dead) is the heir of her son or daughter.
4. If, upon the whole record, a decree cannot be sustained as an unit, it will be reversed.
5. An entire decree against several defendants cannot be reversed as to some, and affirmed as to others. So in relation to plaintiffs.

WILSON, C. J.—The first question presented in this case is, who are the next of kin in equal degree, to the intestate. It appears from the bill, that the intestate died without issue, but that he left a mother, brothers, and sisters.

According to the computation of the civilians, the father and

mother are related to their children in the first degree, and brothers and sisters in the second. According to the rule of *Hilhouse v. Chester*, 3 Day's Rep., 166, 210, the computation of the civilians is adopted to ascertain who are next of kin, and this rule prevails, whether the expression is used in relation to the descent of real or personal estate. The court thinks that the civil law mode of ascertaining who are next of kin, ought to be adopted in construing our statute, as being more agreeable to the nature of things, and more conformable to adjudged cases. The mother is therefore to be considered the next of kin to the intestate, and entitled to the whole of her son's estate. It is, however, objected, that it is now too late to take the advantage, that persons are complainants in the bill in whose favor a decree has been made, who are not by law entitled to such decree, because no objection was taken below to the improper joinder of parties who have no interest in the suit. This objection cannot prevail, however much the court may regret that so much expense has been incurred before the discovery of the error. The court is bound to look into the whole record, and if they find a decree has been made in favor of persons who are not entitled to it, they are bound to reverse it. 4 Hen. and Munf., 200. 16 Johns. Rep., 348.

A further question arises here, whether the decree may not be reversed in part and affirmed in part. This may be done, where the decree or judgment is in distinct parts, but in this case, the decree is for an aggregate sum to all the complainants. It has been decided, that an entire judgment against several defendants, cannot be affirmed as to one and reversed as to others, 14 Johns. Rep., 417; and the same rule should prevail as to plaintiffs. The decree must therefore be reversed. The court have, however, a discretion as to costs, and inasmuch as the defendant did not avail himself of the error below, and the mistake appears to be mutual, the court order, that each party pay his own costs, both here and in the court below.

Decree reversed.

Cowles, for appellant.

Blackwell, for appellee.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF ILLINOIS,
IN DECEMBER TERM, 1826.

PRESENT:

WILLIAM WILSON, CHIEF JUSTICE.

THOMAS C. BROWNE,
SAMUEL D. LOCKWOOD, } ASSOCIATE JUSTICES.
THEOPHILUS W. SMITH, }

LADD AND TAYLOR v. EDWARDS.

Breese R., 139.

Error to Pope.

1. Under the statute of Illinois, where a suit is instituted against two defendants, and one is served with process, the regular course is to take judgment against him who was served, and make the other a party by *scire facias*.
2. Where one of two defendants is served with process, and the other appears by attorney, it is error to render judgment against one alone.
3. The appellate court will presume that an attorney has power to appear.
4. Where one is served, and the other appears by attorney, and a judgment is rendered against one of the defendants only, this is a *discontinuance*, and the judgment will be reversed.

SMITH, J.—This is an action against three joint and several obligors.

The principal error relied on by the counsel for the plaintiff in error, is, the discontinuance of proceedings as to one of the defendants on whom process was not served, but who appeared by attorney. Several decisions of the Supreme Court of Kentucky are cited as supporting the objections urged. Those decisions are inapplicable to the present case, because, they relate to cases of a different character from that before the court. The 31st section of the act of 22d of March, 1819, regulating the practice in the Supreme and Circuit Courts of this State, provides, that the plaintiff may proceed to judgment against those on whom process is served; and by *scire facias* against those on whom it may not be served. There is, however, a discontinuance after the

Ladd and Taylor v. Edwards.

Mason v. State Bank.

Collins v. Waggoner.

appearanc of the defendants, which cannot be cured, and which is clearly error. The statute can afford no means of curing it. One of the defendants was not served with process, yet he appeared by attorney and pleaded. Against him no judgment has been entered. As this court must presume this appearance to have been authorized, and as no proceedings have been had against him after his appearance and plea, and the judgment has been entered against the other two defendants only, it is most evidently erroneous. If, as was remarked in the argument, he died after plea filed, and before the entry of the judgment, the suggestion of his death should have appeared on the record. The court cannot pass beyond the record to ascertain the fact. Let the judgment be reversed with costs, and the cause remanded to the court below with leave to the plaintiff to proceed anew.

*Judgment reversed.**Starr*, for plaintiffs in error.*Cowles*, for defendant in error.

MASON v. STATE BANK.

Breese R., 141.

Appeal from Edwards.

1. Where a record from the court below is defective, the Appellate Court must *jump* at conclusions.

2. Where a case originates before a sheriff and jury in a trial of the right of property, and the record does not show that the Circuit Court could entertain jurisdiction of an appeal, the judgment of the Circuit Court will be *reversed*.

*Judgment reversed.**Eddy*, for plaintiff.*Robinson*, for defendant.

COLLINS v. WAGGONER.

Breese R., 143.

Appeal from Madison.

1. Trespass will lie if an officer abuses his powers under the process.

2. Or acts after the writ becomes *functus officio*.

3. So of the plaintiff in the writ, where he has notice of the irregularity, or is the cause of it.

WILSON, C. J.—The only question presented by this case, for the

Collins v. Waggoner.

decision of the court, is, whether the proper form of action has been adopted.

The facts in the case are, that Waggoner sued Collins in replevin for a cow, upon which issue was taken, and a verdict and judgment for Waggoner. Collins also pleaded a judgment against Waggoner, on which an execution issued, by virtue of which a constable took the cow and sold her, and he became the purchaser. To this plea, Waggoner replied that the cause of action upon which the judgment was rendered, accrued before the first of May, 1821, that there was no indorsement on the execution to take the notes of the State Bank; that before, and after the cow was taken by the execution, he offered to pay it in notes of the State Bank, or replevy it for three years, and that Collins would not permit it to be done, but directed the constable to levy. To this replication there was a demurrer, which was overruled; the case was then tried upon the issue of *non cepit*, and a verdict and judgment for Waggoner. It is contended that trespass will not lie for any act done under a process regularly issued from a court having competent jurisdiction. This rule is true as regards acts in conformity with the authority conferred by the process, even though there should be malice in the manner of executing it. But if the process is abused, trespass will lie, or if, after having done its office, the officer proceeds to act under color of it by the direction of the plaintiffs, they both become liable as trespassers.

In this case before the justice, the statute permitted the defendant to discharge the execution in the notes of the State Bank, or replevy it for three years, which he offered to do, but the plaintiff in the execution refused to permit it to be done. If he had stopped here he would not have been liable as a trespasser, but he became so, by the subsequent levy of the execution by the constable, under his directions, because it had spent its force, and was officially dead. The taking of the cow, therefore, was tortious, and no more authorized by the execution than the taking of the property of a third person. The judgment of the court below is affirmed.

Judgment affirmed.

Starr, for appellant.

Cowles, for appellee.

Flack v. Ankeny.

FLACK v. ANKENY.

Breese R., 144.

Error to Jackson.

1. A *warrant* for an assault and battery, issued by a justice of the peace, held valid. There was no point upon this branch of the case.
2. At common law, and under our statute, a justice may appoint a special constable to execute a warrant in a criminal case.
3. Where a justice has no jurisdiction, but proceeds, he is a trespasser.
4. But where he has jurisdiction, and proceeds erroneously, he will be protected in his action.

LOCKWOOD, J.—This is an action of trespass and false imprisonment, brought by Ankeny against Flack, a justice of the peace, for illegally issuing a warrant, and against Johnson for executing it. The defendants below demurred to the plaintiff's declaration, on which demurrer, judgment was given for the plaintiff, and his damages assessed by a jury of inquiry. The only question presented in this case, is, whether the plaintiff below has set out a sufficient cause of action in his declaration.

The declaration states that Flack, as justice of the peace, unlawfully issued a warrant in substance as follows, to wit: "Commanding any constable of Jackson county, to take the body of Ankeny and others, and bring, etc., to answer the complaint of Edward Valentine in a case of assault and battery, and threats of his life, on the night of the 18th of this instant, wherein he has this day personally appeared before me, and solemnly swore that they struck, kicked and whipped him, so as to mangle his body most cruelly," and given under the hand and seal of the justice. The declaration further states, that "on said warrant is the following indorsement, to wit: 'I depute Robert B. Johnson, constable,' which warrant so unlawfully issued as aforesaid, was by the said Flack directed to, and handed over to the said Johnson, deputed as aforesaid," and that Johnson executed the same, by arresting the said Ankeny. This is the substance of the complaint.

This warrant contains everything that is essential to a valid warrant. It states, in substance, though perhaps not very formally, that Valentine had made complaint on oath, that he had been violently assaulted and beaten by Ankeny and others, and the officer was required to arrest the offender, and bring him before the justice. See 1 Ch. Crim. Law, 38 to 64. The justice had jurisdiction over the offence charged against Ankeny, and he seems to have fully complied with the 27th section of the act, entitled, "An act to regulate and define the duties of justices of the peace and constables," approved 18th Feb., 1823. So far, then, as issuing the warrant is concerned, the justice acted within the pale of his authority, and the court do not see anything very objectionable in deputing Johnson to serve it. At

Flack v. Ankeny.

common law, a justice may authorize any person whom he pleases to be his officer, 1 Ch. Crim. Law, 38 ; and by the fourth section of the act providing for the appointment of constables, approved March 22d, 1819, it is provided, "that nothing in this act shall be so construed, as to prevent any magistrate in the State, from appointing any suitable person to act as constable in a criminal case, where there is a probability that the criminal will escape," etc. The only possible objection that is perceived to the appointment of Johnson, is, that in the deputation, it is not stated that "there is a probability that the criminal will escape." If magistrates were always held liable for every trifling mistake they commit in the performance of their various official duties, few persons would be found willing to accept an office of so little profit, and attended with such great risk. Courts, therefore, from necessity, are bound to view their acts with reasonable indulgence, and if they are governed by good faith, and act within their jurisdiction, they ought not to be held liable for errors of judgment in matters of mere form. The justice had power, at common law, to make the appointment in the manner he did, but if it should be supposed that the statute has impliedly taken away this power, still, as the justice has the power to make the appointment on a certain contingency, it seems no unreasonable presumption that the contingency existed that gave him the power to appoint, in the manner he has done.

The rule, applicable to cases of this kind, is well laid down by the Supreme Court of New York, in the case of *Butler v. Potter*, 17 Johns. Rep. 145. The court there say, "we have decided, that where a justice has jurisdiction to issue an attachment, but proceeds erroneously in doing so, he is not, therefore, a trespasser. The distinction is this, where the justice has no jurisdiction and undertakes to act, his acts are *coram non judice*, but if he has jurisdiction, and errs in exercising it, then the act is not void, but voidable only." The declaration does not negative the idea, but that the justice acted upon the belief of "the probability that the criminals would escape." For anything that appears in the declaration, the justice acted perfectly right in deputing Johnson to serve the warrant, but if he erred in this respect, still it cannot be said but that he had jurisdiction over the question, and this is sufficient for his justification. If the justice is not liable, there can be no pretence for sustaining the action against Johnson. The judgment must be reversed with costs.

Judgment reversed.

Cowles, for plaintiffs in error.

Young and Hall, for defendant in error.

HUBBARD v. HOBSON.

Breese R., 147.

1. Ordinarily, a court of equity will not relieve a party who has neglected to make his defence at law when he had an opportunity of doing so.
2. But if he is ignorant of his rights until after the judgment is rendered, he may seek the aid of a court of equity.
8. The court of chancery cannot, upon a bill to enjoin a judgment at law, decree the payment of the debt, interest, and costs, upon a dissolution of the injunction.

SMITH, J.—Hubbard filed his bill in the court below, for relief against a judgment at law obtained by Hobson in the Gallatin Circuit Court, on a record of a judgment against Hubbard in the Warren Circuit Court, in the State of Kentucky. The court below, on a hearing, dissolved the injunction, and dismissed the complainant's bill, and also decreed that Hobson should recover the amount of the judgment at law, with interest and costs, and six per cent. damages from Hubbard and his security. To reverse this decree the present appeal is prosecuted.

The counsel for the appellant, on the argument, assumed four grounds on which they contended that a reversal ought to be had :

1. That Hubbard being only a co-security with Hobson, in the note which Hobson had been compelled to pay, no more than a moiety • could be recovered from Hubbard.
2. That by the conveyance to Hobson, by Gatewood, of 200 acres of land, to which Hubbard had an equitable interest for a moiety, the claim had been liquidated as far as Hubbard could be liable to Hobson as a co-security.
3. That Hobson had, previously to the rendering of the judgment in the Gallatin Circuit Court, received full satisfaction for his claim against Hubbard, even if Hubbard should be considered as the principal in the note, which Hobson had been compelled to pay, by the acceptance of 200 acres of land from Gatewood in discharge of his claim against Hubbard and Gatewood.

4. That in dismissing the bill, and subsequently rendering a decree against the complainant and his security in the injunction bond, the court exceeded its powers.

To this, it was replied, that the answer of the defendant in equity, was conclusive, and that the complainant, not having availed himself of the matters set forth in his bill by way of defence in the trial at law, was now precluded from offering them in equity, and that that court would not interpose to relieve him.

From a very deliberate, and minute examination of this case, three propositions arising out of the third and fourth points made by the

appellant's counsel, naturally present themselves as the only important grounds for consideration; the first and second points, being deemed untenable, and unsupported by the facts embraced in the case: first, has the claim of the appellee been released or discharged, by his acceptance of property from Gatewood in satisfaction, or has he indemnified himself out of the avails of the property of Gatewood which may have come to his possession?

Second, ought the appellant, if Hobson accepted property in discharge, or indemnified himself out of the property of Gatewood, to have made this a defence to the action at law, and can he now, not having done so, assert it in equity?

Third, is the form of the entry and character of the judgment, warranted?

In order to arrive at a correct conclusion as it regards the first proposition, I have examined the allegations of the bill, and the denials in the answer with great care, nor has the evidence of the several parties, which has been adduced, been less diligently or cautiously observed. I confess, there is much obscurity and want of precision in many parts of the testimony, but from the best analysis I have been enabled to make of it, I have been led to consider it as establishing pretty clearly, that Hobson accepted from Gatewood, the surrender of two hundred acres of land lying on the Nashville road, in Kentucky, for the purpose of either enabling him to create a fund out of which he might indemnify himself, for the liability he had incurred by joining in the note given by Gatewood, Hubbard, and himself to Hays, or as a satisfaction for the responsibility he had incurred in that transaction. That he subsequently came into possession of the land, and conveyed it to one Shackelford, for what consideration does not appear, but its value is established at the time of such sale, to have been of a greater amount than Hobson's claim, and that he allowed Gatewood seven hundred dollars for it, the exact amount of the note he had joined in as a co-security, and had received the land on account of that transaction.

It also appears, that Hobson admitted to one of the witnesses, that the claim in question had been settled out of the property and effects of Gatewood, and that when charged with having received the two hundred acres of land in satisfaction of that claim, he did not deny it. It is true, the appellee in his answer, denies most positively that the claim had been paid out of the effects of Gatewood, or that he had ever received any tract of land to secure or discharge him from his liability created by his securityship, and one of the appellant's witnesses stands manifestly impeached, if his testimony were not clearly

supported in most of its material parts, by three other witnesses. The rule of evidence in equity, is too well settled, and the reason of it too well founded, to lead to the least embarrassment in this state of the case, in deciding, that notwithstanding the positive denial of the appellee, and even admitting the witness alluded to, should be considered as impeached, and his testimony consequently rejected, that the testimony of three of the other witnesses, so far as it regards the point under consideration, must prevail. This being the state of the evidence, it must be conceded, that the first point is affirmatively established, and that the appellant has made out a case requiring the interposition of this court, unless, indeed, he is precluded by his own acts of negligence, or folly; which leads us to the consideration of the second point. It is no doubt a well settled general principle in courts of equity, that they will not relieve, where the party might have availed himself of the same matter in defence in the suit at law, but to this general rule, it is conceived, there are some exceptions.

It is not understood, that, if the matter offered as ground for relief in equity, might have been admitted in a trial at law as a defence, that, *therefore*, a court of equity will not interpose its jurisdiction and power, but that the party must also have been in a situation to have made such defence, and that through negligence, inattention, or some other cause which he might have controlled, he has omitted to do so.

By the establishment of the general principle, it surely was not intended to preclude a party from interposing a defence in equity, of the knowledge of which he only became possessed since the determination of the suit at law, or the truth of which, he had only found himself capable of establishing since such determination. Believing that this exposition of the rule requires only to be stated, to be admitted, I proceed to inquire whether the appellant comes within the rule, as it is interpreted. In the bill, he alleges that he only came to the knowledge of the transfer of the land by Gatewood to Hobson, since the judgment in the suit at law, and that not until after such judgment was rendered, did he become possessed of the means of establishing the fact. It does not appear that this statement is in any way discredited or denied. Can it then be said that here is not a case precisely within the just interpretation of the rule, and that the facts, as they are presented, do not furnish just cause for allowing to the appellant the right of offering, as a ground for relief, that which, true it is, would have been matter of legal defence in the suit at law, but of the existence of which, and the means of establishing, he only became possessed at a period when, in such suit, it was wholly unavailing and could not be heard?

Hubbard v. Hobson.

It is then clear, that he was in a state of moral incapacity to make such defence in the court below, and the reasoning, that he ought to have done so, and cannot therefore now be relieved, is too unsound to need further illustration, and if it be at all necessary to refer to authorities in support of the correctness of the construction I have given to the rule, among the numerous ones which may be found, reference may be had to two, of very modern date—*Holt's executors v. Graham*, 2 Bibb., 192, and *Cunningham v. Cadwell*, Hardin, 123. It is apparent, that the appellant could not have made the matter now presented, the basis of the relief he asks, or a subject of defence in the court below, and that he has, therefore, in no way deprived himself of the right of asserting it in equity. The remaining question regards the form of the entry and character of the decree.

It appears from the record, that the court below dissolved the injunction, *dismissed* the bill, and then rendered a decree in the same cause against the appellant here and his security in the injunction bond, who was no party to the suit, for the amount of the judgment and costs in the suit at law, with interest thereon, and six per cent. damages, and the costs of the suit in equity. The entry of this decree, after the court had adjudicated the cause, and dismissed the bill, is thought to be an anomaly in the history of judicial proceedings, and has doubtless arisen from a natural misconception of the provisions of the statute under which the entry is supposed to be authorized, and is very probably an error in the clerk. From an examination of the 17th section of the act of 22d of March, 1819, regulating the practice of the courts of chancery in this State, which is the statute referred to, and the uniform rule of proceedings in courts of equity, it is not perceived, where the complainant's bill is dismissed as not affording sufficient ground for the interposition of the court, that he can be amerced in any other way than being adjudged to pay the costs of the suit, for (as it is technically said) his false clamor. What the precise form of the proceedings ought to have been after the dismissal of the bill, under the statute, is, perhaps, not so easily settled. It is provided in the statute quoted, that on the dissolution of the injunction, the complainant shall pay six per cent., exclusive of legal interest, besides costs, and that judgment shall be given against the sureties in the injunction bond, as well as the complainant, and that the clerk shall issue an execution for the same, when he issues an execution on said judgment; meaning, doubtless, the judgment at law. Now, if this admits of any interpretation, it must clearly sanction the idea of two separate judgments, or why

provide for two separate executions. If one judgment would embrace the whole, it could not be necessary to have separate executions. If the court is authorized to enter a judgment on the bond, in a summary manner, against the obligors in that bond without notice, which I am rather inclined to doubt, it should, at least, form a separate proceeding from the order or decree in the suit in equity; as it now stands, there are two distinct orders or decrees in the same cause, of directly opposite characters; one, dismissing the complainant from the presence of the court, and which is supposed to have terminated all proceedings in the cause, and put him beyond the power of the court; and the other, rendering on the other hand a large decree in the same suit against him, in favor of the defendant who has never prayed for it. Whether a judgment is authorized to be entered up without notice, or whether the clerk is authorized to issue an execution, without even entering the common form of a judgment, as has been sometimes practised in this State on replevin bonds, it is not necessary now to determine; but that the form and character of the decree is incorrect, and that two decrees or orders, so opposite in their nature and consequences, cannot be made in the same case, nor justified in practice, or warranted by the forms of law, I cannot doubt. Again, if this decree is to stand, in what situation does it leave the complainant?

Upon a review of the whole case, I feel constrained to say, that the claim of Hobson has been extinguished by the receipt and disposition of the property of Gatewood, if the whole current of the testimony in the cause is to be credited. That the attempt to compel the appellant to pay it again, is, to say the least, against the clearest principles of moral justice, and the soundest rules of equity, and that putting out of view the evidently erroneous entry of the decree of the Circuit Court, the judgment of that court ought to be reversed, and a perpetual injunction awarded, enjoining the plaintiff in the action at law from proceeding on that judgment, and that the appellant recover his costs.

The judgment at law stands open, unsatisfied and in full force and effect against them.

In equity, the court have made a decree against him for the identical amount of this judgment with the interest on that judgment, the six per cent. damages and costs of suit. Is this monstrous absurdity and injustice, of subjecting him to satisfy these two judgments, to be countenanced for a moment? Undoubtedly not. The erroneous entry of the decree, is then, from this view alone, too manifest to require further exposition. The decision in this court, in the case of

Hubbard v. Hobson. Blackwell v. The Auditor. Maurer v. Derrick. Biggs v. Postlewait.

Duncan v. Morrison, is, as it relates to this irregularity, directly in point, and has settled the question.

Decree reversed.

Eddy, for appellant.

McLean, for appellee.



BLACKWELL v. THE AUDITOR.

Breese R., 152.

Appeal from Fayette.

A CONTRACT by the State to pay the public printer in "State paper" at its *specie value*, is not to be performed according to the will of the agents of the State, but the market price of the paper is the legal test of *value*.

Judgment reversed.

D. Blackwell, for appellants.

Cowles, for appellee.



MAURER v. DERRICK.

Breese R., 153.

Appeal from Clinton.

WHERE an account sued on is for more than \$100, but the defendant admits that he owes a balance of less than \$100, a justice of the peace has jurisdiction of the demand.

Judgment reversed.

Cowles, for appellant.

D. Blackwell, for appellee.



BIGGS v. POSTLEWAIT.

Breese R., 154.

Appeal from St. Clair.

A SURETY upon an administration bond is not liable unless the administrator has been guilty of a *devastavit*.

Judgment affirmed.

D. Blackwell, for appellants.

Cowles, for appellees.

Mayo v. Chenowith.

Fail v. Goodtitle.

Bond v. Betts.

MAYO v. CHENOWITH.

Breese R., 155.

Appeal from Edgar.

No action lies upon a written instrument, unless it appears upon the face of it, to whom it is payable.

*Judgment reversed.**Robinson*, for appellant.*Cowles*, for appellee.

FAIL v. GOODTITLE.

Breese R., 156.

Appeal from Lawrence.

1. THE Supreme Court regrets that counsel cannot fairly present upon the record the point they wish the appellate court to decide.

2. Under the act of 1819 it is not necessary that a sheriff's deed should be acknowledged in open court.

3. If it is requisite, the law is complied with by an acknowledgment in the court of the county where the sheriff executes the writ, and in which the land lies.

4. The signature of land officers must be proved to make their certificates evidence of a fact.

*Judgment affirmed.**Robinson*, for appellant.*Eddy*, for appellee.

BOND v. BETTS.

Breese R., 158.

Error to Randolph.

Where a note is payable to A. and B., agents for C., and A. and B. sue upon it, and the declaration sets out the note in *hæc verba*, the legal title is in A. and B., and the words "Agents for C." may be regarded upon demurrer as surplusage.

SMITH, J.—This case is presented to the court on a judgment on a demurrer to the plaintiffs' declaration. The demurrer is general, and therefore, every inquiry is precluded, whether causes, which might have proved fatal, might not have been specially assigned for causes of demurrer. Equally untenable are the objections to the jurisdiction, no plea to the jurisdiction of the court having been pleaded. The declaration shows complete jurisdiction.

Bond v. Betts.

The real and only question is, whether the action on the note can be sustained in the manner and form set forth in the declaration. The note is in the following words, viz.: "Six months after date I promise to pay Shadrack Bond and Pierre Menard, agents for Warren Brown, the sum of nineteen dollars and twenty-five cents for value received. Witness my hand and seal this 20th day of February, 1823." The promise to pay is directly to the plaintiffs, and the consideration, by the note itself, is, by every fair and grammatical construction of language, expressed to be received of them.

The addition to the names of the plaintiffs of the words, "agents for Warren Brown," in the note, is mere description of the person; it is therefore surplusage, and cannot affect the promise. It is evident the words were only used for the purpose of showing to whose use the money was to be received, and would not control the express promise to pay it to the plaintiffs. The contract and the consideration are expressed without ambiguity or doubt. The language is not susceptible of any equivocal meaning. The distinction taken by the defendant's counsel in error, in the use of the words "agent of," and "agent for," is really not understood, nor where the difference lies, which could alter the sense of the language and meaning of the parties. It is supposed that to describe a person as agent of, or agent for another, is synonymous in language and import. The various cases cited by the defendant's counsel have also been examined. They are considered altogether inapplicable.

The general principle, in cases of the description, within the range of which the present case seems to fall, is, that the words thus used are mere description of the character or person of the obligee or promisee, and can in no way control or alter the obvious import of the contract, and intent of the parties to it. This principle is very clearly illustrated in the case of *Buffin v. Chadwick*, 8 Mass. Rep., 103. The declaration, in that case, recited the plaintiff's name, and as suing in the character of "*Agent of the Providence hat manufacturing company*," and the defendant, by the note, promised to pay the plaintiff *as agent* of said company, and expressed the value to have been received *of the company*. Yet the court held that the action was rightly brought, and that the plaintiff, styling himself agent in his declaration, was merely descriptive of the person. The present case, then, is clearly much stronger than that, and the correctness of the principle more apparent. In that case, the consideration is admitted to have proceeded from the company, in this, from the obligees themselves.

The promise, in the case before the court, being directly to the

Bond *v.* Betts.Curtis *v.* Swearingen.Clemson *v.* Kruper.

plaintiffs, the consideration therefor being expressed to have been received of them, there can be no doubt that the action ought to be sustained.

The addition of "agents" is mere description and surplusage, and cannot affect the right to recover. The judgment on the demurrer must therefore be reversed, and the proceedings remanded to the Circuit Court of Randolph.

Judgment reversed.

T. Reynolds, for plaintiffs in error.

Baker, for defendant in error.

CURTIS *v.* SWEARINGEN.

Breese R., 160.

Appeal from Clinton.

1. JOINT tenants may make a subdivision of the time of their respective occupancy of the property held in joint tenancy, and if an injury is committed upon the joint right, while it is held in the exclusive possession of one of the joint tenants, under the subdivision, trespass may be sustained by the exclusive possessor for the time being.

2. To establish title under a sheriff's sale, the purchaser must produce a judgment, execution and deed. (a)

3. A certificate of purchase at a sheriff's sale is not evidence of title.

Judgment affirmed.

D. Blackwell, for appellant,

Benjamin Mills, for appellee.

(a) Pope *v.* Hinman, 1 Gilm. R., 181.

CLEMSON *v.* KRUPER.

Breese R., 162.

Error to St. Clair.

1. THE refusal of the Circuit Court to grant a new trial cannot be assigned for error.

2. An exception to the ruling of the court below must be taken upon the trial, and before the jury is discharged.

3. A bill of exceptions lies:

Clemson v. Kruper.

Collins v. Claypole.

Flack v. Harrington.

1. For receiving improper evidence.
2. For rejecting proper evidence.
3. For misdirecting a jury on a point of law.
4. *Quære*. If counsel, in the infancy of a State, misapprehend the practice, and thus fail to perform their duty to their client, a bill in equity will lie.

*Judgment affirmed.**D. Blackwell*, for plaintiff.*A. Cowles*, for defendant.

COLLINS v. CLAYPOLE.

Breese R., 164.

Appeal from Madison.

THE refusal of a Circuit Court to grant a new trial cannot be assigned as error.

Judgment affirmed.

FLACK v. HARRINGTON.

Breese R., 165.

Error to Jackson.

Where a justice of the peace, without a precedent complaint, and without actual knowledge obtained by a view, issues a warrant against a citizen for a supposed criminal offence, he becomes a trespasser.

LOCKWOOD, J.—This case is clearly distinguishable from the case of Flack and Johnson v. Ankeny, decided this term. The allegation here is, that Flack officiously, and without any complaint on oath, issued his warrant for the apprehension of Harrington. And these allegations are found true by the verdict of a jury, upon a plea putting the facts directly in issue. Will the law tolerate such conduct in its officers? This is clearly not a case of error in judgment in a case legally before the justice.

In fact, there was nothing before the justice to authorize him to act at all, for he made the case, and then adapted his process to the assumed facts. A justice, in issuing a warrant for the apprehension of a person for a criminal offence, acts ministerially, and cannot, of his mere motion, institute such a proceeding, unless in particular cases, where he is present at the commission of the offence.

If he voluntarily acts, he is liable to an action, and trespass will lie. The law appears to be well settled on this point, as will appear from

the following authorities. In Swift's Digest, page 800, the law on this subject is stated as follows:

If a justice of the peace, without complaint or information, should issue a warrant, and cause a person to be arrested, trespass would lie against him; for though he is excused when he issues a warrant on a false accusation, yet it is otherwise where he issues his warrant without accusation. Swift cites Cro. El., 130. In the case of Wallsworth v. McCullough, 10 Johns., p. 93: This was an action of false imprisonment; on the trial the following facts appeared. That the plaintiff was arrested by virtue of a warrant issued by defendant as a justice of the peace, on the complaint of the overseers of the poor, setting forth the examination of the mother, etc. The overseers, however, testified that they never made complaint, nor did they request the justice to issue the warrant.

They also stated that one Garley was occasionally employed by them to do their business, but they had not employed him in this case, and on whose application the warrant had actually issued. The overseers appeared before the justice on the examination, and agreed to the proceedings. The warrant issued without authority, because it was not issued upon the complaint of the overseers of the poor, or either of them. The justice, acting ministerially in this case, was responsible for issuing the warrant without the application required by the statute. The subsequent consent of one of the overseers, that the proceedings might go on, would not deprive the plaintiff of the action for the previous arrest upon a warrant irregularly issued. And the same court, in the case of Jones v. Percival, 2 Johns. Cases, 49, held that "trespass for a false imprisonment lies against a justice of the peace, who voluntarily, and without the request or authority of the plaintiff in an action before him, issues an execution against the body of the defendant, who is privileged from imprisonment, who claims his privilege, and is taken on the execution." The errors assigned are altogether technical, and relate to form, and do not appear to require any examination. The judgment must be affirmed with costs.

Judgment affirmed.

Cowles, for plaintiff in error.

Eddy, for defendant in error.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1827.

PRESENT :

WILLIAM WILSON, CHIEF JUSTICE.

THOMAS C. BROWNE,
SAMUEL D. LOCKWOOD, } ASSOCIATE JUSTICES.
THEOPHILUS W. SMITH, }

RICHARDSON v. PREVO.

Breese R., 167.

Appeal from Clark.

1. WHERE a bill in Chancery for an injunction contains no equity upon its face, the injunction will be dissolved on motion.

2. A defence at law must be made before judgment—equity cannot relieve.

3. On a bill to enjoin a judgment at law, the Court of Equity has no power to enter up a decree for the debt, upon a dissolution of the injunction.

Decree Reversed.

RYAN v. EADS.

Breese R., 168.

Error to Washington.

1. A RETURN of *nihil* to an *alias* writ of *scire facias*, which is signed by a deputy sheriff, omitting the name of his principal, is bad.

2. Deputy sheriffs must return all processes in the name of the sheriff.

Ryan v. Eads.

Giles v. Shaw.

Mellick v. De Seelhorst.

3. Where a judgment is rendered by default, it will be reversed for any irregularity apparent upon the face of the record.

Judgment reversed.

T. Reynolds, for plaintiff.

McRoberts, for defendant.

—•••—
GILES v. SHAW.

Breese R., 169.

Error to Madison.

1. Oyer is not demandable of a record.

2. A variance between the record declared on and the one produced in evidence can be taken advantage of only by plea of *nul tiel record*.

3. *A demurrer must be formal*—if oyer is craved, but the demurrer omits to set it out, and the record also is silent, the demurrer will be treated as a *nullity*.

Judgment reversed.

Cowles, for plaintiff.

D. Blackwell and *T. Reynolds*, for defendant.

—•••—
MELICK v. DE SEELHORST.

Breese R., 171.

Error to Madison.

1. No one can tell from the report what the facts of this case were.

2. It related, however, to a new promise, by which the plaintiff sought to avoid the effect of a plea of the statute of limitations, in an action of assumpsit, and the court laid down these generalities:

1. That an absolute promise to pay a debt barred by the statute was binding.

2. That an absolute acknowledgment of the continuance of the debt, without a promise to pay, would support the declaration.

3. That when the defendant promises to pay upon a contingency, the plaintiff must show that the event has occurred.

Judgment reversed.

Cowles, for plaintiff.

McRoberts, for defendant.

Mears v. Morrison.

MEARS v. MORRISON.

Breese R., 172.

Error to Randolph.

1. An agent must execute a written instrument in the name of his principal.
2. Where the declaration is against the principal, but does not show his obligation, but that of the agent, the judgment will, after verdict, be arrested.

WILSON, C. J.—This is an action of covenant, brought by the plaintiff in error, against the defendant, upon the following obligation :

“I do hereby sell, deliver over, and transfer to William Mears, the time that a negro girl named Harriet, and her children, had to serve William Morrison, she being a daughter of a servant of said Morrison, indentured under the laws of this Territory concerning the indenturing of slaves, for the sum of three hundred dollars, payable in twelve months, with interest from this date. Witness my hand and seal, 17th June, 1818.

“GUY MORRISON, *agent*.” [SEAL.]

Upon the trial, a verdict was found for the plaintiff in error, and upon motion of the defendant below, the court arrested the judgment upon the ground that the instrument declared on created no liability on William Morrison. The correctness of this opinion is the only point to be decided.

Something has been said by counsel as to the sufficiency of this instrument to impose a liability upon any one. Upon this point the court will give no opinion ; it is unnecessary, and, indeed, it would be improper to determine upon the rights or obligations of persons not parties in the case. Has Morrison, then, bound himself in person or by his agent ? The covenant is in the first person. The signing by Guy Morrison is also in the first person. In no part of the instrument is William Morrison referred to as covenanting, not even by recital.

What is the grammatical construction of the language used in the covenant ? It cannot be that it is the defendant who covenants when the covenant commences in the first person, and is signed, not by him, but by Guy Morrison, agent. By no construction of language or principle of law can the term *agent*, affixed to the name of Guy Morrison, be intended to import that he is the agent of William Morrison. The usual and appropriate mode of signing a deed by an agent or attorney is for him to sign his principal's name, and then to sign his own as agent. Here the seal is clearly not the seal of William Morrison, but of another person. There are numerous cases to be found in illustration of this rule. It was so decided in the cases of

Mears v. Morrison.

Jones v. Lloyd.

White v. Cuyler, 6 Term Reports, 176; Wilks v. Back, 2 East., 142; 4 Mass. Rep., 595; 5 Mass. Rep., 299; and 2 Wheat., 56; Duvall v. Craig. We are clearly of opinion that the Circuit Court decided correctly in arresting the judgment, and that its judgment ought to be affirmed.

Judgment affirmed.

J. and T. Reynolds, for plaintiff in error.

Breese, for defendant in error.

JONES v. LLOYD.

Breese R., 174.

Error to Gallatin.

1. Action of debt—judgment in damages—reversed and remanded, with directions to award a *venire de novo*. (a)
2. In a proper case, where a technicality occurs, the appellate court will grant a writ of *certiorari* upon an allegation of *diminution*, with leave to amend, and upon the return of the writ bringing up the amended record, the judgment will be affirmed.
3. But where there is nothing in the record to amend by, a *certiorari* would be unavailing.

THIS is an action of debt on a sealed negotiable note, assigned to the defendants in error. The declaration sets forth the amount of the note as the debt due, and alleges that the plaintiffs sustained damage by the non-payment thereof, to fifty dollars.

The defendant pleaded several pleas, which it is not necessary to enumerate. Issues of fact were made up, the cause tried, and a verdict rendered for the plaintiffs for eight hundred dollars and fifty cents, without specifying whether in debt or damages. Upon this verdict a judgment was rendered up as follows: "It is therefore considered by the court that the plaintiffs recover against the said defendant eight hundred dollars and fifty cents damages, by the jurors aforesaid, in their verdict aforesaid, assessed, and also their costs," etc. Under the sixth assignment of errors, which is the only one it is considered necessary to notice, it is contended, the action being in debt, and the judgment in damages, that the judgment is improper, and wholly irregular. We think the judgment to be evidently erroneous. It ought to have been for the amount of the debt found to be due, and the damages sustained, which damages would have been the amount of interest on the sum found as the debt by the jury.

The verdict of the jury is therefore an improper finding and a judgment is incapable of being rendered thereon.

The plaintiff should, at the trial, have required a correction of the verdict, and had the same put into form. Even then, the plaintiffs could not have recovered the whole amount found by the jury, that

Jones v. Lloyd.

Vincent v. Morrison.

amount exceeding the amount of the note declared on, and the damages, as laid in the declaration. It is certain, that the plaintiffs cannot recover more than their declaration covers, for this would be to award him more than he asks himself. In cases of torts, where a jury have found more than the amount of damages laid, the courts have refused, on application, to permit the plaintiff to enlarge the amount of damages laid in his declaration, so as to avail himself of the verdict, and enter judgment thereon. Such has been the decision of the Supreme Court of New York. The practice is, where the amount found by the verdict exceeds the amount in the declaration, to enter a *remittitur* for the excess. This not having been done, and the judgment being in damages, is clearly erroneous. The remaining question is, whether this court has the power to afford the means of correcting it? It has been the practice, in the courts of Kentucky, in cases very analogous to the present, for the party desirous of having the error amended, when the proceedings are in the appellate court, to suggest a diminution of the record, and ask for a *certiorari* to the Circuit Court, to certify the diminution, and apply to the Circuit Court for leave to amend the proceedings in the meantime, so that, when the *certiorari* is returned, the error will appear to have been corrected in the court below. In this case, however, such a course, if it had ever been pursued, would have been unavailing, as it is not perceived how the Circuit Court could have either amended the verdict or determined what portions of it were the debt, and what the damages, or what sum should have been relinquished. The error being then incurable, the judgment must, for this cause, be reversed, and the cause remanded to the Circuit Court of Gallatin county, with directions to award a *venire de novo*. The plaintiffs recover their costs.

Judgment reversed.

(a) Vide notes to James v. Hughll, 2 Scam. R., 361.

VINCENT v. MORRISON.

Breese R., 175.

Appeal from St. Clair.

1. A special verdict must find the *facts* upon which an issue of law is based, and not merely the *evidence* of the facts.
2. In a case between vendor and vendee, where the former gives a deed with covenants, and is guilty of no fraud in the sale and conveyance, the consideration is sufficient to support an action upon the notes of the vendee to secure the payment of the purchase-money.
3. Where pleas are filed, and a demurrer thereto is sustained, and the defendant repleads, the first pleadings must be regarded as waived.

Vincent v. Morrison.

4. If a special verdict is found, no fraud can be imputed to the parties by inference, unless the fact is specially found.
5. An administrator cannot, by any contract, bind the estate of his intestate.

LOCKWOOD, J.—This is an action of debt on a sealed note, brought by Morrison in the St. Clair Circuit Court, to recover the sum of \$466. The defendants pleaded four several pleas, to which the plaintiff below demurred, and the court decided that all the pleas were insufficient, and thereupon, the following order was entered, to wit: “On motion of defendant’s attorney, leave is given to plead on the third Monday of July next, and the cause continued to next term;” at said term, defendants filed four new pleas, which were severally traversed and issues joined. On the trial, a special verdict was taken, comprising the facts relied on by defendants to bar the action. On the special verdict, the court below rendered judgment for Morrison, and the cause is brought into this court by appeal. A number of errors have been assigned, but the court do not deem it necessary to examine them all in detail. In relation to the first set of pleas, they are of opinion, that, by the motion to plead generally, they were abandoned, and cannot be relied on, as subsisting defences to the action. The second set of pleas, being all traversed, the special verdict presents all the questions that the court are called on to decide.

In order to enable the defendants below to get at their defence, it was necessary for them to prove in what the consideration of the note consisted; all we find in the special verdict on that point, is as follows:

“We further find that on the 4th day of October, 1821, the said S. Morrison, and Olive Morrison, executed the deed of conveyance for the house and lot, to the said Michael Vincent, set forth in the third plea of the said defendants, and that the same was delivered to him, and he accepted it, and that the said note or writing obligatory, was made to the said Samuel at the same time, and that they are in the handwriting of the said John Hay.” In relation to special verdicts, it is a general rule, that they must find facts, and not merely the evidence of facts. *Jac. Law Dict. Title “Verdict.”* In this verdict, there is no evidence whatever, that the note was executed as the consideration for the deed. It is true, that facts are stated, that, possibly, might have authorized the jury to have presumed the note was given, as the consideration for the deed. But as the jury have not found the fact, it would probably be a stretch of power in the court, if they should conceive the deed and note executed in consideration of each other. As the special verdict is defective, it would, perhaps, be the duty of the court to send back the case to the Circuit Court, with directions, either to amend the special verdict if it could be done, or award a *venire de novo*: Yet as the court, upon an inspection of the whole

verdict, are satisfied that plaintiff below is entitled to recover, admitting the fact to exist, that the note was executed in consideration of the execution of the deed mentioned in the pleadings, sending back the case would only be attended with costs, without any benefit to the parties.

The special verdict does not find, that Morrison and wife were guilty of any fraud in the sale to Vincent, and the law will not impute fraud to them. In the case of *Abbot v. Allen ex'r of Allen*, 2 Johns. Chan. Cases, 159, it was decided by the Court of Chancery, that, "a purchaser of land, who had paid part of the purchase money, and given a bond and mortgage for the residue, and is in the undisturbed possession, will not be relieved against the payment of the bond, or proceedings on the mortgage, on the mere ground or defect of title; there being no allegation of fraud in the sale, nor any eviction, but must seek his remedy at law, on the covenants in his deed." The same point is also decided, in the case of *N. J. & S. Bumpas v. Platner*, Bay and Underwood, 1 Johns. Ch. Cases, 213. In the case under consideration, the verdict finds, that one of the defendants received a deed from Morrison and wife, which contains a variety of covenants—that Vincent entered into possession of the house and lot, conveyed by said deed, and has continued to live in it ever since, and still is in the possession of the same. Upon the principle decided in the above cited cases, even a court of equity would not relieve, although the title was defective. The party having thought proper to take covenants to secure his title, he must resort to them in the first instance. It was, however, urged on the argument, that the covenants contained in the deed, were not personal covenants, but covenants in the character of agents. In order to ascertain how far it was the intention of Morrison to bind himself by this deed, it will be necessary to examine the deed itself for the terms of the covenants. By the deed, Morrison and wife, in the capacity of administrators, covenant, that the intestate died seized; that the said Olive Morrison, administratrix, was duly licensed to make sale of the premises; that it was necessary to sell the same for the purpose of paying the debts of the intestate; that previous to the sale, she took the oath prescribed by law; that she gave public notice in the newspaper printed at Edwardsville, according to the directions of the law in such case made and provided, and of the court; and that one François Olivier Valois offered the most for the said premises, which were struck off to him for the sum of 466 dollars. They also further covenant in their said capacity, that the premises are free from incumbrance, and that they will warrant and defend the same forever, against the claim or demands of all persons in law and equity, and

Morrison and wife sign and seal the deed, without the addition of their representative character. Under these covenants, it was urged, that Morrison was not personally liable, but that the assets of the intestate were the only fund which could be reached to pay any damages that might arise, from the breach of the covenants in the deed. That the assets of the intestate cannot be bound to answer a breach of most of these covenants, is apparent from the nature of the covenants. Most of these covenants are, that the administratrix has done her duty as administratrix. If an administrator, in the course of his administrations, is guilty of any improper conduct, the estate is not answerable for such malfeasance. In relation to covenants, the general rule is that an administrator has no power to charge the effects of the intestate, by any contract originating with himself; and it seems from the current of decisions, that his contracts, in the course of his administration, or for the debts of his intestate, render him liable *de bonis propriis*. The whole doctrine, relating to the liability of administrators covenanting in their capacity of administrators, in the sale of real estate, was very elaborately discussed by the Supreme Judicial Court of Massachusetts, in the case of Sumner, administrator, v. Williams & Williams, 8 Mass. Rep., 162. In that case, the administrators, in their capacity of administrators, covenanted that, as administrators, they were lawfully seized of the premises; that they were clear of all incumbrances, etc.; that they in their said capacity, had good right to sell, etc., and that as administrators, they could warrant and defend the premises, and then signed and sealed the deed as the court held the administrators personally liable for a breach of these covenants. It is to be remarked that a very material difference exists between the case in Massachusetts and the one before this court, in this, that in the case in Massachusetts there were no covenants that the administrators had proceeded in all respects, according to the directions of the statute, which, as the court has before observed, must from their very nature be personal covenants. The court infer from the pleadings and verdict, that the *gist* of the defence to the action below, consists either in the fraud of the plaintiff, or a breach of the covenants—on the part of Morrison and wife, that she had proceeded according to the law in making sale of the premises mentioned in the deed. In conclusion, therefore, the court are of opinion, first, that there was a good consideration for the note, to wit: the deed with covenants; second, that there has been no failure of the consideration, because Vincent received the possession of the premises contracted for, and has remained in the quiet possession thereof, until the trial of the cause; third, that the verdict does not find that any fraud was practised on the defendants;

Vincent v. Morrison.

Greenup v. Woodworth.

Cobb v. Ingalls.

and lastly, if there has been any breach of any of the covenants mentioned in the deed, it is no bar to this action, but the party must resort to his covenant for damages. The judgment of the court below is affirmed.

Judgment affirmed.

Blackwell, for appellants.

Cowles, for appellee.

GREENUP v. WOODWORTH.

Breese R., 179.

Error to Randolph.

WHERE an action of debt is brought upon a judgment against administrators, and the declaration alleges a *devastavit*, and a default is entered, no writ of inquiry is necessary.

Judgment affirmed.

Young, for plaintiff in error.

Baker, for defendant in error.

COBB v. INGALLS.

Breese R., 180.

Error to Morgan.

1. Motions, demurrers, and other dilatory steps taken during the progress of a cause should be disposed of in the order in which they are made, filed, or taken.
2. A demurrer waives a preceding motion.
3. And a plea is a waiver of a precedent demurrer.

SMITH J.—Three grounds are relied on by the plaintiff in error, for the reversal of the judgment of the Circuit Court:

1. That the motion to dismiss the cause ought to have been acted on by the Circuit Court.
2. That permitting the plaintiff to amend his declaration, before acting on such motion, was erroneous.
3. That the court should have decided the demurrer before the issue in fact was tried.

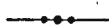
The untechnical manner in which the record has been made up, is calculated to lead to some confusion in the examination of the real merits of this case. As far, however, as we can give to it a fair interpretation, it would seem, that the defendant, without assigning any grounds for cause of dismissal, upon the plaintiff's being permitted to

Cobb v. Ingalls.

Clary v. Cox.

amend his declaration, abandoned his motion, and filed a general demurrer, and without insisting on a decision of the demurrer, filed a plea of the general issue. We cannot doubt that this demurrer to the declaration was a waiver of his motion to dismiss the cause, but whether it was or not, the grounds of that motion, not appearing on the record, cannot of course be inquired into. By pleading in chief the general issue, the defendant equally waived his demurrer. If the causes of demurrer were thought by his counsel to have been sufficient, a decision on the demurrer should have been insisted on. Had the court refused, as was suggested on the argument, to decide the questions raised by the demurrer, the defendant should have rested his case, and not have pleaded to the merits. The court would then have been compelled to decide the question of law, and the defendant, if not satisfied therewith, would have had the opportunity of having that opinion reviewed in this court. He, however, thought proper to waive that right, and thereby conclude himself by a trial on the merits. The jury rendered a verdict against him, and as there is no irregularity therein, we are bound to say, that the judgment of the Circuit Court must be affirmed with costs.

Judgment affirmed.



CLARY v. COX.

Breese R., 181.

Appeal from Sangamon.

AFTER judgment, and upon motion to quash the execution, the fact that one of the defendants did not sign the bond upon which the action was founded is no basis for relief on a motion in a court of law, the remedy of the aggrieved party is in equity, if he has not waived it by his negligence.

Judgment reversed.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF ILLINOIS,
IN DECEMBER TERM, 1828.

PRESENT:

WILLIAM WILSON, CHIEF JUSTICE.

THOMAS C. BROWNE, SAMUEL D. LOCKWOOD, THEOPHILUS W. SMITH,	}	ASSOCIATE JUSTICES.
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NANCE *v.* HOWARD.

Breese R., 183.

1. A poll-tax is unconstitutional.
2. What property is subject to, and what exempt from execution, and the *general policy* of our laws upon this subject considered.
3. A slave or registered person of color may be sold upon execution.
4. A slave is a chattel.

Lockwood, J.—The point presented to the consideration of the court in this case, is, whether a registered servant is liable to be taken and sold on execution? By the act concerning judgments and executions, approved January 17, 1825, “all and singular, the goods and chattels, lands and tenements and real estate” of a judgment debtor, shall be liable to be sold on execution. The phrase, goods and chattels, means personal property in possession.

Before entering on this subject, it is necessary to lay down the true rule in relation to what kinds of property ought to be subjected to seizure and sale on execution. The dictates of honesty, as well as sound policy, require, as a general rule, that every description of tangible property of the debtor should be liable to pay his debts, unless it be such articles of the first necessity, that the legislature, from motives of humanity to persons who have families, may reserve for their use. And such, doubtless, was the intention of the legislature, when they declared, “that all and singular the goods and chat-

tels, lands and tenements and real estate," shall be sold on execution. The legislature, however, pursuing the dictates of an enlightened humanity, have, by the 19th section of the above recited act, reserved for the use of families, a variety of articles of personal property of the first necessity, from sale on execution. But registered servants are not among the reserved articles. Are then registered servants, goods or chattels, within the meaning of the statute? This is a question of mere dry law, and does not involve in its investigation and decision, anything relative to the humanity, policy, or legality of the laws and constitution, authorizing and recognizing the registering and indenturing of negroes and mulattoes.

In order to ascertain the nature of the interest that the master possesses in his registered servants, it will be necessary to review the several statutes that have been passed by the legislature concerning them.

The first act, giving character to the interest of the master, is, "An act concerning executions," passed 17th of September, 1807; the 7th section thereof recites, "and whereas, doubts have arisen whether the time of service of negroes and mulattoes, bound in this Territory, may be sold under execution," it was, therefore, enacted, "that the time of service of such negroes and mulattoes may be sold on execution," etc. This section, taken in connection with its preamble, must be considered as declaratory of what the law was, rather than introductory of a new rule. On the same day, an act was passed, subjecting "bound servants," with a variety of personal property, to taxation. By the third section of the "act concerning servants," passed also on the 17th of September, 1807, the benefit of the contract of service may be assigned by the master, with the consent of the servant, and shall pass to the executors, administrators and legatees of the master.

These three acts are all the statutes that have been found, passed by the Territorial legislature. These acts can bear no other construction, than that the legislature considered this description of servants as property, for they rendered them liable to sale on execution, to be assigned by their masters with their consent, to pass to executors, administrators and legatees, and to taxation. By the 20th section of the 8th article of the Constitution of this State, it is declared, "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax, in proportion to the value of the property he or she has in his or her possession." A poll-tax would seem from this feature in the Constitution, to be inhibited. The legislature, however, it will be seen, by examining their several acts relative to

revenue, have invariably taxed servants, not by poll, but "by valuation."

I refer to the acts passed 27th of March, 1819, 18th of February, 1823, and the 19th of February, 1827. The 15th section of the last mentioned act, and which is the law now in force for "raising a revenue," is as follows: "Whenever, in their opinion, the revenue arising to the county from the tax on lands shall be insufficient to defray the county expenses, the County Commissioners' Court shall have power to levy a tax, not exceeding one-half per cent., upon the following descriptions of *property*, viz.: On town lots, if such lots be not taxed by the trustees of such town, on slaves and indentured or registered negro or mulatto servants, on pleasure carriages, on distilleries, on stock in trade, on all horses, mares, mules, asses and neat cattle, above three years of age, and on watches with their appendages, and such other property as they shall order and direct." By this act, registered servants are expressly denominated property. Each of the execution laws, passed March 22d, 1819, and 17th of February, 1823, contain the following provision, to wit: "That the time of service of negroes or mulattoes may be sold on execution against the master, in the same manner as personal estate; immediately from which sale, the said negroes or mulattoes shall serve the purchaser or purchasers for the residue of their time of service."

There is, however, no such provision in the act relative to executions, passed 17th of January, 1825, and which act repeals all former acts; and hence, it is argued, that the legislature intended in future, that registered servants should not be subject to seizure and sale on execution. This inference would no doubt be correct, if these servants were only made liable to execution by express enactment of the legislature, but from the review of the legislation, in relation to indentured and registered servants, I am inclined to the opinion, that the legislature have always regarded them as property, and that the object of the legislature, in expressly authorizing them to be sold on execution, was not to introduce a new rule, but to remove "doubts" that had arisen on the subject. If, then, the statutes concerning executions are only to be considered as declaratory of what the law was, then the omission of a similar provision in the act of 1825, cannot be deemed decisive of the intention of the legislature. The intention must, therefore, be sought in the "several acts *in pari materia* and relating to the same subject."

All these acts ought to be taken together, and compared in the construction of them, because they are considered as having one

object in view, and as acting upon one system. This rule applies, though some of the statutes may have expired, or are not referred to in the other acts. 1 Kent's Com., 433. By the 22d section of the act "concerning attachments," passed 24th of January, 1827, authority is given to the sheriff, when he "shall serve an attachment on slaves, or indentured or registered colored servants, or horses, cattle or live stock," to "provide sufficient sustenance for the support of such slaves, indentured or registered colored servants and live stock, until they shall be sold or otherwise legally disposed of, or discharged from such attachment."

There is no express provision in this statute to authorize a levy and sale of registered servants; but from this section no doubt can exist that the legislature acted upon the supposition that registered servants were regarded as property which might be seized and sold. And no good reason is perceived why these servants should be liable to attachments, and not be liable to sale on executions obtained by the ordinary prosecution of a suit. The proceeding by attachment, and by a common action, are intended to effect the same object, to wit: the sale of the debtor's property, in order to pay the creditor his debt. I have, therefore, come to the conclusion that indentured and registered servants must be regarded as goods and chattels, and liable to be taken and sold on execution. In support of this opinion I refer to the case of *Sable v. Hitchcock*, 2 Johns. Cases, 79.

That case was this. In the State of New York they have an act by which, "in order to prevent the further importation of slaves into that State," it is enacted, "That if any person shall sell as a slave within that State, any negro or other person who has been *imported or brought* into that State after the 1st of June, 1785, he shall be deemed guilty of a public offence, and forfeit £100, and the person so imported or brought into that State shall be free." The plaintiff had been imported into New York after June, 1785, and after the death of the plaintiff's master she was sold by her master's executors to defendant, against whom she brought her action to recover her freedom. The Supreme Court of that State decided (and the decision was affirmed by the Court of Errors) that a sale in the course of administration, or by persons acting in *auter droit*, as executors, assignees of absent or insolvent debtors, sheriffs on execution, and trustees, would not be within the act, so as to subject the vendors to the penalty, or make the slave *free*. Judge Kent, in delivering his opinion, says, "While slaves are regarded and protected as property, they ought to be liable to an essential consequence attached to property—that of being liable to the payment of debts. If it is otherwise, the debtor is possessed of

Nance v. Howard.

Fanny v. Montgomery.

a false token, and the creditor is deceived." The analogy between the cases exists in several respects.

The masters in each case are, by law, secured in the services of the servants in the New York case for life, and in this case for a period of years; but in each case the services are general, and not restricted or limited to any particular trade or business. In neither case did the services arise out of any contract, or with reference to any special confidence reposed in the masters.

They were both slaves in the States from whence they were imported, and their services were held in the same manner that the services of absolute slaves are held, for the masters were entitled to all the fruits of their labor. The rights of the masters had no reference to the benefit of the servants; hence they are in every essential particular personal property, and subject to most of its attributes and liabilities.

The only difference perceived between the two cases is, that *Sable*, upon being brought into New York, became a servant for life to her master, but not subject to transfer and sale by the act of her master, with or without her consent. But *Nance*, upon being brought into the Territory of Illinois, and being registered, became a servant to her master until she should arrive "at the age of thirty-two years," and she is by law liable to be sold by her master upon her giving her consent in the "presence of a justice of the peace."

This difference cannot operate to exempt *Nance* from the rule applied to the case of *Sable*, and particularly as this very difference regards *Nance* more in the light of property than it does *Sable*.

A sale by *Sable's* master, with or without her consent, would operate to emancipate her. Upon the whole, the court is of opinion that the judgment of the Circuit Court must be affirmed with costs.

Judgment affirmed.

McRoberts, for plaintiff in error.

Cavarly, for defendant in error.

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FANNY v. MONTGOMERY.

Breese R., 188.

Appeal from Fayette.

1. A fugitive slave case. In trespass for illegally arresting a person as a fugitive from labor, the plea of justification must show all of the facts which existed at the time the justice granted his certificate.
2. The plea should also affirmatively show to whom the certificate was given—whether it was granted to the owner of the fugitive, or to his or her agent; if to an agent, his name must be set forth.
5. *Quærs.* Whether a certificate is *conclusive* or only *primâ facie* evidence under the Act of Congress of 1793?

Fanny v. Montgomery.

LOCKWOOD, J.—This is an action of trespass, assault and battery and false imprisonment, brought to try the plaintiff's right to freedom. The defendant plead in bar, that plaintiff and others, were taken before a justice of the peace in and for Bond county, as a person *held* to labor and owing service in the State of Kentucky, to John Houston, and that the justice of the peace, upon proof to his satisfaction that the said Fanny, with others, *did* owe service or labor to said Houston, in Kentucky, according to the laws thereof, and that the said Fanny, and others, *were* fugitives from the service of him, the said Houston, etc., did in pursuance of the constitution and laws of the United States, grant a certificate to said Houston, *or* his attorney, to have and take said Fanny, and that he take her where she belonged. Defendants further say, that after the granting said certificate, and while it was in force, they assisted said Houston, *or* his attorney, to take said negroes, for the purpose of removing them, as authorized by said certificate, they having no interest whatever in said negroes; that no more force was used than necessary, and that this is the same trespass mentioned in the declaration, and which said certificate, the defendants have now in this court, ready to be produced, etc. To which plea the plaintiff demurred, and on joinder therein by defendants, the Circuit Court sustained the plea, and gave judgment for defendants, and thereupon an appeal was taken to this court. A great number of errors have been assigned. I shall only, however, notice such of them as I deem important to the decision of the case, as presented by the record. The first error assigned is, that it does not appear from the plea, that the justice, in granting the certificate, had jurisdiction.

No principle in pleading is better settled, than that where a party justifies under a power derived from an inferior court or magistrate, that he must show that such court or magistrate had jurisdiction of the subject matter. The authorities to this point are so numerous, that it is unnecessary to cite them. Does it then appear from this plea, that the justice had jurisdiction of the case? The third section of the act of Congress referred to in the plea, declares, "That when a person held to labor in any of the United States, or either of the Territories, on the northwest or south of the river Ohio, under the laws thereof, shall *escape* into any other of the said States or Territories, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and take him or her, before any judge of the circuit or district courts of the United States, residing, or being within the State, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made, and upon proof, to the satisfaction of such

judge or magistrate, either by oral testimony, or affidavit taken and certified by a magistrate of any such State or Territory, that the person so seized or arrested, *doth*, under the laws of the State or Territory from which he or she *fled*, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate, to give a certificate thereof to such claimant, his agent or attorney, which shall be a sufficient warrant for removing the said fugitive from labor, to the State or Territory from which he or she fled." In order to give a magistrate jurisdiction under this act, it ought to appear, that the person apprehended as a fugitive slave, had escaped from the State or Territory where the labor or service is due, into the State or Territory where he or she is apprehended, and that proof, either by oral testimony or affidavit, be exhibited, that the person so seized or arrested, *doth*, under the laws of the State or Territory from which he or she fled, owe service or labor to the person claiming him or her.

It does not appear from this plea, that Fanny had escaped, or fled from Kentucky; the allegations being, that she was taken, etc., as a person held to labor and owing service in the State of Kentucky, to Houstens. This is not sufficient, for the authority conferred to take and arrest fugitives from labor or service, is only granted, where the fugitive has fled, or escaped from the service of his or her master.

But the plea is still more fatally defective, in not stating that the proof was, that she *now* owes service and labor in Kentucky.

The words of the act *are*, *doth* owe service or labor. The proof exhibited may be true, that she did owe service, and yet show no right to her present service, for that service may long since have terminated; and, consequently, she would not be liable to be taken and carried back to Kentucky.

Under the attachment laws, an affidavit, that a debtor hath absconded, being in the past tense, is insufficient; and such an error has been decided to render an attachment irregular, and all proceedings under it void. I consider the first assignment of error well taken an sufficient to reverse the judgment, but as this case will have to go to the Circuit Court again, I think it better to notice some of the other errors assigned. The seventh error assigned is, that the plea does not set forth to whom the certificate was given, but is in the alternative. The language of the plea is, that the certificate was granted to "Houstens or his attorney," without naming who the attorney was. This, I think, altogether too uncertain; it ought to have shown affirmatively, to whom it was granted, and if granted to an attorney, who that attorney was. The plea is therefore bad in this respect. The ninth error assigned is, that it is not stated that either of defen-

Fanny v. Montgomery.

Finley v. Ankney.

Greenup v. Brown.

dants assisted Houston, or his attorney, or that they acted under any legal authority. The words of the plea, are, "that defendants assisted Houston or his attorney, to take said negroes." Who did they assist? Houston, or his attorney? and if the attorney, who was that attorney? The plea does not answer this plain interrogatory, with any kind of certainty; it is, therefore, too uncertain in this respect.

For these, and other reasons, I am of opinion that the judgment must be reversed, with costs, and remanded to the Fayette Circuit Court, with liberty to defendants to amend their plea, upon payment of the costs occasioned by the plea.

I have not deemed it necessary, in making up an opinion in this cause, to give an opinion on the question, how far a certificate which is good, *prima facie*, can be inquired into. Whether such a certificate would be final and conclusive, does not arise on this plea. We are not required, from the state of the pleadings, to go into any such inquiry; on this point, therefore, I forbear; for "sufficient unto the day is the evil thereof."

Judgment reversed.

Hall and Cowles, for plaintiff in error.

McRoberts, for defendants in error.



FINLEY v. ANKNEY.

Breese R., 191.

Error to Jackson.

1. On granting a re-hearing in Chancery, the decree is thereby *ipso facto* vacated.

2. When the time for the replevy of a judgment has expired, an execution may issue, without attempting to charge the surety on the replevy by action or execution.

Judgment affirmed.

Cowles, for plaintiff.

Baker, for defendant.



GREENUP v. BROWN.

Breese R., 193.

Error to Randolph.

1. WHERE a perfect defence might have been made at law, equity will not relieve.

*Greenup v. Brown.**Greenup v. Woodworth.**Barrett v. Gaston.*

2. A *devastavit* takes place upon the return of an execution *nulla bona*.

3. Where an execution issues informally, illegally, irregularly, or erroneously, the proper remedy is for a stay of proceedings, and a motion to quash, and not by bill in equity.

*Decree affirmed.**McRoberts*, for plaintiff.*Baker*, for defendant.GREENUP *v.* WOODWORTH.

Breese R., 194.

Error to Randolph.

WHERE an ample defence might have been made at law, equity will not relieve, under any circumstances.

*Decree affirmed.**McRoberts*, for plaintiff.*Baker*, for defendant.BARRETT *v.* GASTON.

Breese R., 196.

Error to Randolph.

The Supreme Court will not entertain a writ of error upon a judgment in *tort* after the death of the *tort* feisor.

SMITH, J.—In this case, it is manifest, the proceedings on the writ of error cannot be sustained.

The cause of action is for a *tort*, and could not survive against the executor of James Gaston, who has been made defendant in error.

Suppose this court were to reverse the judgment of the Circuit Court, what object could be gained by such reversal? The executor has only to plead the fact of the death of his testator, and the Circuit Court, on the proof of the truth of such plea, would be bound to give judgment for the defendant. Is not, then, this court bound, when the plaintiffs in error themselves, by their own proceedings, disclose the same facts, to pronounce a decision similar in its effects? The record shows the cause of action, the writ of error suggests the death of James Gaston and that Stephen is his executor, and that, consequently, as against James Gaston, in whose favor the judgment of the court below was, the cause of action is gone, and cannot survive against his executor. If the executor retains the possession of the plaintiff's wife, under a claim, in right of his testator, as an indentured servant

Barrett v. Gaston.

Curtis v. People.

or slave, that might present a question of legal investigation in a new action against him, but it can form no ground of examination in this. We are therefore of opinion, that the writ of error must abate, and that judgment be entered accordingly.

Writ of error abated.

Cowles, for plaintiffs in error.

Breese, for defendant in error.

CURTIS v. PEOPLE.

Breese R., 197.

Error to Clinton.

1. Objections to the form of an indictment must be made upon a motion to quash, and cannot be reached by a motion in arrest of the judgment.
2. The omission of the indictment to set forth that it was found upon the "*oath*" of the grand jurors is a formal objection.
3. In an indictment for an assault with intent to commit murder, the count must aver an unlawful and felonious intent.
4. Two or more counts in an indictment—the one good, the residue bad—after a general verdict, the judgment will not be arrested.

At the April term, 1828, of the Clinton Circuit Court, the grand jury of Clinton county preferred the following bill of indictment against the appellant, viz. :

Of the April term of the Clinton Circuit Court in the year of our Lord one thousand eight hundred and twenty eight.

State of Illinois, Clinton county, ss.

The grand jurors chosen, selected and sworn, within and for the county of Clinton, in the name and by the authority of the people of the State of Illinois upon their present, that at the county aforesaid, on the tenth day of December, in the year of our Lord one thousand eight hundred and twenty-seven, with force and arms, to wit: with a rifle gun then and there held in his hands and loaded with powder and one leaden ball, Henry Curtis, on the day and year aforesaid, at the county aforesaid, with intent to kill one James Tilton, and him did with the said loaded gun assault and discharge against and upon, giving then and there to the said Tilton, one dangerous wound in his said leg, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the State of Illinois.

And the jurors aforesaid do further present, that on the day and year aforesaid, at the county aforesaid, Henry Curtis did then and there with force and arms make an assault upon the body of James

Tilton, the said Tilton then and there being in the peace of God and the said people, and him then and there, the said Curtis did beat, bruise and ill treat, contrary to the statute in such case provided, and against the peace and dignity of the same people of the State of Illinois.

Upon this indictment, at the September term, Curtis was tried and found guilty. A motion was then made in arrest of judgment, which the court overruled, and sentenced him to pay a fine of 50 dollars, and to imprisonment for the term of twenty days. From this judgment Curtis appealed, and assigned as causes for the reversal of the judgment: 1. That it does not appear by the indictment that it was presented upon the *oaths* of the grand jury.

2. The indictment does not pursue the language of the act of assembly, but is totally variant therefrom.

3. The indictment does not charge the defendant with shooting with intent to *commit murder*, the offence designated in the act, but with intent to *kill*.

4. The indictment contains two counts and for separate offences, and the first one being bad, a general verdict of guilty cannot be supported.

SMITH, J.—The grounds of error assigned and relied on, for a reversal of the judgment in this case, which it becomes important to notice, are,

1. That it does not appear that the presentment of the grand jury in the bill of indictment, was on the oaths of the grand jurors.

2. That in the indictment, the offence charged is not in the language of the statute, although founded on the statute, but is wholly variant therefrom.

3. That in the first count, the offender is not charged with shooting with intent to commit murder, but with intent to kill.

4. That there are two counts in the indictment for separate offences, and the first being bad, a general finding of guilty is bad, and that, therefore, judgment ought not to have been rendered on the verdict.

These objections will be considered in the order they are stated. The omission of the word "oaths" in the indictment, although evidently a slip of the pen, would, we have no doubt, been fatal, according to the decisions at common law.

But the forms of proceedings in criminal cases, having been prescribed by our criminal code, and the time prescribed when objections to want of form are to be made, it becomes necessary to inquire, whether the prisoner has not waived this objection by his plea of not guilty, and whether it is not, therefore, too late *now*, to urge this objec-

tion as a sufficient cause for the reversal of the judgment. In the act constituting the code of criminal jurisprudence of this State, under the 15th division, relative to the construction of the act itself, and the duty of courts, it is provided by the 150th and 151st sections, that the form of the commencement of an indictment shall be in substance the same as that used in the present case, including the word "oaths," which is omitted, and that "every indictment or accusation of the grand jury, shall be deemed sufficiently technical and correct, which states the offence in the terms and language of this code, or so plainly, that the nature of the offence charged may be easily understood by the jury; that all exceptions which go merely to the form of an indictment, shall be made before trial, and that no motion in arrest of judgment, or writ of error, shall be sustained for any matter not affecting the real merits of the offence charged in such indictment." The manner, then, in which the legislature intended the word "oaths" to be used, seems to be, necessarily, as a term of form, and not substance, and must be so considered; and it is equally clear, that under this view, the prisoner is prohibited, by the latter clause above recited, from now urging it as ground of error. It cannot, in the language of that clause, in any way affect the real merits of the offence charged in the indictment. As it regards the second objection, it is to be remarked that there is, in no part of the criminal code, a definition of an assault with an intent to kill or murder, but barely a specification of the punishment for the offence of an assault with an intent to murder. The statute then, cannot be said to have required any language whatever to be used in describing the offence, but has left it, as it was at common law.

The conclusion in the first count, is a common law, as well as a statute conclusion, and if the offence be well recited as at common law, it will be sufficient to sustain the first count. In an examination of this count, however, there exists a striking and manifest departure from the common law precedents, in not averring that the intent was unlawful and felonious.

The most approved precedents aver, not only that the assault was committed willfully and maliciously, but with the intent *feloniously* to kill and *murder*.

Hence, it seems to be not only necessary and indispensable that the intent should be charged to be in itself malicious and unlawful, but, that the felonious design and extent of the crime intended to be perpetrated, should be distinctly and clearly set forth, otherwise, the inference would be, that the assault might be excusable or justifiable in self-defence. Nothing could be more certain and comprehensive than

an allegation that the assault was made with an intent to murder. This would, from its technical sense, entirely cover the offence intended to be charged. As the offence charged in the indictment is simply an assault with an intent to kill, and as there is no allegation that it was done with a felonious, unlawful, or malicious design, it is certainly fatally defective, whether the omission of the term "murder," be important or not. As the objections contained in the third assignment, are substantially the same as those in the second, and are embraced in the reasoning in relation to those, it is unnecessary to examine them.

The remaining one to be considered is, whether a general verdict of guilty, rendered on an indictment where one of the counts is materially defective, be good.

It was urged on the argument, that the two counts were for different offences, one being for a simple assault, and the other for an assault with an intent to kill, and that, therefore, a general verdict could not stand, and more particularly so, as the court could not know to which the jury applied the evidence.

The objection is not tenable. It is unimportant, as to which the jury applied the evidence, because, a general finding of guilty as to the whole, necessarily includes the guilt as to a part. In finding the prisoner guilty of the greater offence, the one of inferior grade is surely included. If the assault was committed with the intent alleged, though that intent may not have been sufficiently set forth to sustain the first count of the indictment, he is still guilty of an assault from the verdict, because the jury, having found the truth of the whole charge, the less is included in the greater. It would, however, be sufficient, in meeting this objection, to say, that the universal practice is, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the higher or more criminal part of the charge, or, as it may be precisely laid, to insert two or more counts in the indictments. Thus, in an indictment for burglary, it is usual to insert one count for a burglarious entry, with an intent to steal the goods of A, and stealing them, and another count, to steal the goods of another person, or with an intent to kill, and murder A, and no doubt has ever been entertained that it is both advantageous and legal; nor is it any objection upon demurrer, or in arrest of judgment, that separate offences of the same nature are joined against the same defendant. It is, also, well settled, that the defectiveness of one or more of the counts will not affect the validity of the remainder, because judgment may be rendered on those which are valid, and the court can regulate the severity of the sentence, according to their discretion, on the counts of the indictment which are

Curtis v. People.

Street v. Blue.

Ankeny v. Pierce.

supported. 1 Chitty's Criminal Law, 204 and 205. It has been repeatedly determined in the Supreme Court of New York, that if one count in an indictment be good, although all the others are defective, it will be sufficient to support a general verdict of guilty. The People v. Olcott, 2 Johnson's Cases, 311. The People v. Curling, 1 Johnson's Reports, 320. In the present case, the finding of the jury of the guilt of the prisoner in making the assault with an intent to kill, establishes an assault, whether it be accompanied with such intent or not; and, although it is true that the finding as to the *first* count is inoperative, yet it cannot affect the finding as to the second. We are therefore of opinion that the general verdict of guilty is supported, although the first count is defective; but as the imprisonment was doubtless made a part of the sentence of the court in reference to that count, and the evidence adduced under it, justice would seem to require that so much of the judgment of the Circuit Court as subjects the prisoner to imprisonment be reversed, and the residue, as to the imposition of the fine and costs be affirmed.

Judgment affirmed.

McRoberts, for appellant.

Cowles, State's attorney, for appellee.

STREET v. BLUE.

Breese R., 201.

Error to Gallatin.

THE refusal of the inferior court to *grant* a new trial cannot be assigned for error.

Judgment affirmed.

Hall, for plaintiff.

Eddy, for defendant.

ANKENY v. PIERCE.

Breese R., 202.

Error to Jackson.

A tenant is *estopped* from disputing the title of his landlord.

WILSON, C. J.—This is an action of covenant from the Jackson Circuit Court, founded upon an article of agreement, for the leasing of the big Muddy Saline by Pierce, the plaintiff below, to the de-

*Ankeny v. Pierce.**Moreland v. State Bank of Illinois.*

fendant, Ankeny. To the plaintiff's declaration the defendant filed five pleas, all of which were withdrawn, except the third and fifth.

The third plea avers a want of consideration, to which plea the plaintiff replies, and the defendant files a demurrer to his replication. The court overruled the demurrer. This opinion is assigned for error, but I am clearly of opinion that the court decided correctly. The replication shows a good and valuable consideration; it sets forth a lease from the said Pierce to the said Ankeny, of the premises therein described, and the tenant, Ankeny, is estopped from denying the title of the landlord, Pierce, under whom he had enjoyed the premises, as is alleged in the plaintiff's declaration. The demurrer to the fifth plea was well sustained; the plea does not allege that Pierce had not obtained a lease from the governor, and for aught that appears, he may have had good title and authority to lease the premises. Another objection to the plea is, that it does not appear, but that defendant entered upon and enjoyed the demised premises; if so, he has no ground of complaint until after eviction, which is not alleged. The judgment of the court below is affirmed, with all costs here and below, and execution is directed to issue from this court.

Judgment affirmed.

Baker, for plaintiff in error.

Cowles, for defendant in error.



MORELAND v. STATE BANK OF ILLINOIS.

Breese R., 203.

Appeal from Gallatin.

1. The rules of decision are the same in a court of equity as at law.
2. A suit before a justice of the peace is assimilated to a bill in equity.
3. A mere delay to sue the principal does not discharge the surety.
4. A clause in a bank charter, which requires the directory to use diligence in the collection of their debts, is directory merely, and their omission to do so does not discharge a surety upon the indebtedness.

LOCKWOOD, J.—This action was originally commenced before a justice of the peace, and judgment rendered in favor of plaintiff below, against defendants below, as securities to a note given to said plaintiff. The defendants appealed to the Circuit Court of Gallatin county, where the following facts were agreed to by the parties: "That the note was discounted upon the application of one Garner Moreland, and the accommodation was made to him upon his check; that neither the directors of the bank, nor any agent for them, ever gave the said Hazle Moreland and John Willis any notice of the failure to

renew said note, or of its non-payment, until the commencement of this suit; and that at the time the note fell due, and for twelve months after, the said Garner Moreland resided in this county, and was in solvent circumstances; and that he afterward, before the commencement of this suit, left the State, and took with him all his property, and that these facts are all the evidence in the case." The Circuit Court affirmed the judgment of the justice of the peace, and the case is brought into this court by appeal. It is, among other things, urged that the securities became released, because the president and directors did not cause the note to be protested; and, secondly, because they did not use diligence against the principal in the note. By the 22d section of the bank law, "It shall be the duty of the board of directors of the said principal bank or branch to have the note (if a note) protested; if said loan be secured by mortgage, to have the mortgage foreclosed, and to proceed to the collection of said debt without delay." Does the mere omission of the board of directors to have the note protested and sued operate as a release to the securities?

It is a general rule of the common law that mere delay to sue does not release the security. And it is a controverted point, whether a refusal to comply with the request of the security to bring suit would release him.

But, by "an act providing for the relief of securities in a summary way in certain cases," passed 24th March, 1819, it is provided that a security may, by notice in writing to the creditor, require him to put the note, etc., in suit, and in default to comply with such request, the creditor shall thereby forfeit his right of action against such security. In this case no such request has been made.

It may, however, well be doubted, whether the legislature did not intend to take away from securities, the right to give this written notice to bring suit, for by the 12th section of the bank law, the security is to "sign such note as principal," and, consequently, liable to be considered as such. It is, however, unnecessary to decide, what effect a notice to bring suit would have, as no such notice has been given.

In putting a construction upon the 22d section of the bank act, it is the duty of the court to ascertain the intention of the legislature, by carefully examining the context, and give such a construction to each of the provisions of the act, as will harmonize with other parts of the act, if it can be done without violating any of the acknowledged rules of construing statutes. Acting upon this principle, the court are of opinion, that the 22d section of the bank law is to be considered as merely directory to the board of directors, and their

neglect forms no ground of defence to the debtor, or his securities. The directors were not acting in their own right, and any omission of duty on their part ought not to work an injury to the State, as it was in the power of the securities, by paying the note, to commence suit, and thus secure themselves. The court are confirmed in this construction by a recent decision of the Supreme Court of the United States.

By the post-office law, "If any postmaster shall neglect, or refuse to render his accounts, and pay over to the postmaster-general, the balance by him due, at the end of every three months, it shall be the duty of the postmaster-general to cause a suit to be commenced against the person or persons so neglecting or refusing; and if the postmaster-general shall not cause such suit to be commenced, within six months from the end of every such three months, the balances due from every such delinquent shall be charged to, and be recoverable from, the postmaster-general." It is observable, that the requirement of the act of Congress, to commence suit against postmasters, is as strong, as in the case of the board of directors under the bank act, and in addition, the postmaster-general is to be charged with all sums due from postmasters, if he neglects performing his duty. Yet the Supreme Court of the United States have decided, in an action on the postmaster's bond, that his securities were not discharged, by the neglect of the postmaster-general, and that the remedy given against the postmaster-general, was intended for the benefit of the government, and, consequently, was cumulative in its character.

We have not seen this decision, but such we understand to be its import. It was argued, on the part of the defendants below, that by commencing suit before a justice of the peace, the Circuit Court was authorized to decide this case, in the same manner that a court of equity would have done. The rule, however, is the same in courts of law and equity, and whatever would exonerate the security in one court, would also, in the other. The facts being ascertained, the rule must be the same in this court as in a Court of Chancery. *People v. Jansen*, 7 Johns., 337. It is laid down in *Jansen's* case, "that mere delay in calling on the principal will not discharge the surety, is a sound and salutary rule, both at law and in equity." This case of *The People v. Jansen*, is relied on by defendants below, as an authority in point, to show, that the *laches* of the board of directors, operate as a good defence to this suit. If that case, since the decision in the Supreme Court of the United States, on postmasters' bonds, should be considered as correctly decided, still, we think that there is

Moreland v. State Bank of Illinois.

Gore v. Smith.

Phœbe v. Jay.

a wide difference between that case and this. The securities in that case, were bound for the faithful performance of the duties of an officer. Here, the defendants bound themselves absolutely, to pay the note when it became due.

They are to pay unconditionally. The risk of the insolvency of the principal is assumed by the sureties, and it was their business to see that the principal paid the note when it became due. Jansen's case is not, therefore, analogous; and it was also decided under its peculiar circumstances, which have no application in this case. The objection that was made in the argument, that the bank, by its cashier, cannot take an appeal, is not well founded, for both appeals were taken by the defendants below, and if the appeal had been taken on behalf of the bank, by the cashier, or prosecuting attorney, the court do not perceive that it would be liable to objection. The judgment must be affirmed with costs.

Judgment affirmed.

Gatewood, for appellants.

Eddy, for appellee.

GORE v. SMITH.

Breese R., 206.

Error to Franklin.

It is error to render a judgment by default, even where the process has been regularly served, unless the declaration was filed ten days prior to the commencement of the term of court.

Judgment reversed.

Eddy, for plaintiff.

McRoberts, for defendant.

PHŒBE v. JAY.

Breese R., 207.

Error to Randolph.

1. The ordinance of July 18, 1787, *prohibited* slavery in the territory north and west of the river Ohio.
2. That ordinance was valid, and while it remained in force no system of slavery could exist in the northwestern territory.
3. The act of the Territorial legislature of Indiana, approved September 17, 1807, which provided for the migration, registration, and service for a specified period, of persons of color, is invalid.
4. A state of slavery cannot exist under a *contract* in a free territory, where the person to be enslaved has no volition, but is compelled either to sign a contract or return to a state of bondage in the slave State from whence he migrated with, and where he was held in bondage by his master.
5. After a Territory forms a constitution, and is admitted into the Union as a sovereign State, her absolute

Phœbe v. Jay.

powers of sovereignty then attach, and she has competent power to establish, regulate, protect, abolish, or recognize slavery, as her people may in their discretion determine.

6. The ordinance of 1787 could only be abrogated by common consent.
7. The formation of a State constitution by Illinois, and her admission into the Union by Act of Congress, is an abrogation of the ordinance by "*common consent*."
8. The constitution of Illinois having recognized the validity of the indentures of slaves, made in pursuance of the Indiana Act of 1807, a state of slavery is legally existing in Illinois, notwithstanding the ordinance of 1787.
9. An indentured slave is a chattel under the constitution and laws of Illinois, passes to the heirs and personal representatives of his or her master, and may be sold as personal property under an execution against the master, or his heirs or personal representatives.
10. A plea that the plaintiff was an indentured servant under the Act of Indiana of 1807, as recognized by the Illinois constitution, need not show a *strict compliance* with the provisions of the law; this is proper by way of replication, and the *onus probandi* is upon the plaintiff.
11. An administrator has no power to compel an indentured slave to attend to the ordinary business of the administrator—the latter has simply a right to the custody of the slave until he or she can be sold.
12. Distinction between a constitution and an ordinary legislative act. The constitution can make a void act valid, but no number of legislative repetitions can make an originally void act obligatory.
13. A demurrer opens the entire record, and will be sustained against the party who committed the first fault in pleading, though his adversary's pleading is defective.

LOCKWOOD J.—This is an action of trespass, assault, battery, wounding and false imprisonment, to which the defendant pleaded, that the plaintiff, on the 26th day of November, 1814, before Wm. C. Greenup, clerk of the Court of Common Pleas of Randolph county, Illinois Territory, agreed to, and with, one Joseph Jay, the father of this defendant, and who is now deceased, to serve him as an indentured servant, for and during the term of forty years from and after the day and year aforesaid, and then and there entered into, and acknowledged an indenture, whereby she bound herself to serve the said Joseph Jay, forty years next ensuing said date aforesaid, conformably to the laws of the Illinois Territory, respecting the introduction of negroes and mulattoes into the same; and defendant avers, that the said Joseph has since departed this life, leaving this defendant, his only son and heir at law, and who is also his administrator—that plaintiff came to his possession lawfully, after the death of said Joseph—that in order to compel plaintiff to attend to, and perform the duties of an indentured servant, in doing the ordinary business of him, the said defendant, and remain in his said service, he had necessarily to use a little force and beating, which is the same trespass, etc. To this plea the plaintiff demurred, and the defendant joined in demurrer. The Circuit Court sustained the plea, and thereupon, the plaintiff obtained leave to withdraw her demurrer and reply.

Several replications were filed, to which defendant demurred, and the demurrers were sustained, and judgment given on the demurrers for the defendant. To reverse which judgment, a writ of error has been brought to this court. From the conclusion I have arrived at, I deem it unnecessary to state the matter, or legality of the repli-

cations. The first question presented by this case is, whether the "act concerning the introduction of negroes and mulattoes into this territory, passed 17th September, 1807," by the Territory of Indiana, and continued by the Territory of Illinois, was not a violation of the sixth article of the ordinance of Congress, passed 13th of July, 1787, for the government of the territory of the United States, northwest of the Ohio River. That portion of the ordinance, applicable to this case, reads as follows: "There shall be neither slavery, nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." The first, second, and third sections of the act of 1807, are as follows: "It shall and may be lawful, for any person being the owner or possessor of any negroes or mulattoes of and above the age of fifteen years, and owing service or labor as slaves in any of the States or Territories of the United States, or for any citizen of the said States or Territories, purchasing the same, to bring the said negroes and mulattoes into this territory. Sec. 2. The owner or possessor of any negroes or mulattoes, as aforesaid, and bringing the same into this territory, shall, within thirty days after such removal, go with the same before the clerk of the Court of Common Pleas of the proper county, and in the presence of said clerk, the said owner or possessor shall determine and agree to, and with, his or her negro or mulatto, upon the term of years which the said negro or mulatto will and shall serve his or her said owner or possessor, and the said clerk is hereby authorized and required to make a record thereof, in a book which he shall keep for that purpose." Sec. 3d. "If any negro or mulatto, removed into this territory, as aforesaid, shall refuse to serve his or her owner as aforesaid, it shall and may be lawful, for such person, within sixty days thereafter, to remove the said negro or mulatto to any place, which, by the laws of the United States, or Territory from whence such owner or possessor may, or shall be authorized to remove the same."

If the only question to be decided was, whether this law of the territory of Illinois conflicted with the ordinance, I should have no hesitation in saying that it did.

Nothing can be conceived further from the truth, than the idea that there could be a voluntary contract between the negro and his master. The law authorizes the master to bring his slave here, and take him before the clerk, and if the negro will not agree to the terms proposed by the master, he is authorized to remove him to his original place of servitude. I conceive, that it would be an insult to common sense to contend, that the negro, under the circumstances in which he was placed, had any free agency. The only choice given

him was a choice of evils. On either hand, servitude was to be his lot. The terms proposed were, slavery for a period of years, generally extending beyond the probable duration of his life, or a return to perpetual slavery in the place from whence he was brought. The indenturing was, in effect, an involuntary servitude for a period of years, and was void, being a violation of the ordinance, and had the plaintiff asserted her right to freedom, previous to the adoption of the constitution of this State, she would, in my opinion, have been entitled to it. But, by the third section of the sixth article of the constitution of this State, "Each and every person who has been bound to service by contract or indenture, in virtue of the laws of the Illinois territory heretofore existing, and in conformity to the provisions of the same, without fraud or collusion, shall be held to a specific performance of their contracts or indentures, and such negroes and mulattoes as have been registered in conformity with the aforesaid laws, shall serve out the time appointed by such laws."

And here, certainly, a very grave question arises, and that is, if these indentures were originally void, can any subsequent act, and that without the consent of the persons most interested, make them good? I readily concede, that no subsequent legislative act could have made the indenture valid. Can, then, this constitutional provision make a void indenture, valid? In order, more fully to understand this question, it will be necessary clearly to ascertain the difference between an act of the legislature, and a constitutional provision. What is meant by the term "constitution" as applied to government? It is the form of government instituted by the people, in their sovereign capacity, in which first principles, and fundamental law, are established. The constitution is the supreme, permanent and fixed will of the people in their original, unlimited and sovereign capacity, and in it, are determined the condition, rights and duties, of every individual of the community.

From the decrees of the constitution there can be no appeal, for it emanates from the highest source of power, the sovereign people. Whatever condition is assigned to any portion of the people by the constitution, is irrevocably fixed, however unjust in principle it may be. The constitution can establish no tribunal, with power to abolish that which gave, and continues, such tribunal in existence. But a legislative act is the will of the legislature, in a derivative and subordinate capacity. The constitution is their commission, and they must act within the pale of their authority, and all their acts, contrary, or in violation of the constitutional charter, are void.

If they have no power to pass an act, any number of repetitions of unconstitutional acts, or acts beyond the pale of their authority, can

Phœbe v. Jay.

never make the original act valid. As it respects the Territorial legislature, the ordinance had the same controlling influence over their acts, as a constitution has over the legislature of a State. By this course of reasoning, I conclude, that, although the act of the Territory, in relation to indenturing negroes and mulattoes, was originally void, yet it enumerated a description of persons, that the constitution of this State has undertaken to fix their condition in life, and the rights they shall possess in this community. It has determined that they shall serve their masters according to the provisions of the law before recited. It was, however, urged on the argument of this cause, that the people of this State, when they assembled in convention, were not absolutely free and independent, and at liberty to adopt what frame of government they chose, for they were controlled by the Constitution of the United States, and by the ordinance of 1787. The provision of the third section of the sixth article of the constitution of this State, does not, as I conceive, in any way conflict with the Constitution of the United States. Several of the States, in the formation of their constitutions, have ingrafted into them provisions relative to the right to hold persons in slavery, without objection. The ordinance, however, is no doubt still binding upon the people of this State, unless it has been abrogated by "common consent." By "common consent," I understand the United States, and the people of this State, and whenever they shall agree, that the whole, or any part of the ordinance of 1787, shall be repealed, it will, so far as it affects this State, become a dead letter. The people of this State, by recognizing the validity of the indenturing and registering of servants, in pursuance of the act of 1807, before referred to, gave their consent to alter so much of the ordinance as was repugnant to the constitution of this State. When the constitution of this State was presented to Congress in order to our admission into the Union, the attention of that body was called to that clause of our constitution which requires that registered and indentured servants shall be held to serve pursuant to said act, and which was contended, and if I mistake not, was conceded to be, a violation of the ordinance. Congress, however, admitted this State into the Union with this constitutional provision, and thereby, I think, gave their consent to the abrogation of so much of the ordinance as was in opposition to our constitution. Having thus shown that registered and indentured servants are bound to serve, the next question that arises in this case, is, whether the defendant has set forth sufficient matter in his plea to support his claim to the services of the plaintiff? Several objections have been made to the plea. Those which are deemed important, I shall notice.

1. That the plea does not state the existence of those facts which would authorize the indenturing, to wit: that she owed service to Joseph Jay, was above fifteen years of age, and that the indenturing took place within thirty days after she was brought into the Territory.

2. That by the death of Joseph Jay, the indenture ceased to have any operation.

3. The plea is uncertain whether defendant claims the service in virtue of his administration, or his heirship: and

4. That the plea does not answer the wounding.

As it regards the first objection, it evidently appears from the constitution, that it does not intend to confirm every indenture. It only saves those that were made, "in conformity to the provisions of the law, without fraud or collusion." If the court could not inquire beyond the fact of indenturing, then this provision of the constitution would be useless and absurd. But upon the ground assumed, to sustain the validity of these indentures, no doubt can exist, that, unless the indenturing was in conformity to the law, it is void. On whom then must the *onus probandi* rest? I should think, in ordinary cases, on the party who sets up a claim, founded on statute, and in derogation of common right. It was, however, on the argument urged with great force, that if it was incumbent on the master after a lapse of several years, to prove that every prerequisite of the statute had been complied with, it would subject the master in most cases to great inconvenience and expense, and in many cases to the loss of services that the constitution had secured to him. Witnesses might forget, remove or die, and thus, by the lapse of time and accident, be deprived of their proof. It was also urged, that something ought to be presumed in favor of records, that their officers had done their duty. These arguments possess considerable weight, and I feel it the duty of the court, in deciding on the point, to allow them to have some influence.

If the injury complained of, had consisted in constraint imposed on the plaintiff soon after the time of the indenturing before the clerk, and no subsequent imprisonment of the plaintiff had taken place, the statute of limitations would have barred the action in five years, and the defendant would not then have been bound to have pleaded a right to restrain the plaintiff's liberty under the indenture. The statute of limitations was made for the purpose of quieting parties, after so much time has elapsed, as affords a presumption, that the evidence might be lost by death or forgetfulness. That this statute is a wise law, all who are conversant with trials in courts, and the frailty and forgetfulness of mankind, will readily concede. The law, therefore, discourages

lawsuits, after so much time has intervened, as to create the presumption that witnesses have died or forgotten the transaction ; or, in other words, the law favors the diligent and not the slothful. Had the plaintiff brought an action within five years after the commencement of what she complains as an unlawful restraint on her liberty, I should have been clearly of opinion, that it was incumbent on the defendant to have shown, not an indenturing only, but that the indenture had been made, "in conformity to the provisions of the law." But after a period of more than ten years has intervened, and an acquiescence in the mean time of the plaintiff, I think it would impose, what would, in some cases, be impossible, and in all, an unreasonable hardship, to require the defendant to plead and prove all the facts necessary to show the validity of the indenture. I am, therefore, of opinion, under the circumstances of this case, that it was unnecessary in the plea to aver the existence of the facts to warrant the making of the indenture in question. As, however, this opinion is based on legal presumptions, it would certainly be competent for the plaintiff, by way of replication, to state facts inconsistent with these presumptions, and thereby take upon herself the burden of proving that they had no existence. The second objection to the plea is, "that by the death of Joseph Jay, the indenture ceased to have any operation." The act "concerning the introduction of negroes and mulattoes into this Territory," passed September the 17th, 1807, contains no provision as to the consequences of the death of the master upon the indentured servants. But, by the third section of the sixth article of the constitution of this State, before referred to, it is declared, that "each and every person, who has been bound to service, by contract or indenture, in virtue of the laws of Illinois Territory, shall be held," etc. From this phraseology, it would seem, that the convention recognized the existence of more than one law that had reference to the indenturing and registering of negroes and mulattoes.

It hence becomes necessary, to inquire into all the laws of the Territory in relation to this description of persons. By the seventh section of the act, entitled, "an act concerning executions," passed the 17th of September, 1807, being the same day on which the indenturing law was passed, it is enacted, "That the time of service of such negroes or mulattoes, may be sold on execution against the master, in the same manner as personal estate, immediately from which sale, the said negroes and mulattoes shall serve the purchaser or purchasers for the residue of their term of service." By the act, entitled, "an act to regulate county levies," passed the same day, "bound servants," are declared to be taxable as property. And by the third section of the act, entitled, "an act concerning ser-

vants," passed on the said 17th day of September, 1807, it is declared that, "the benefit of the said contract of service shall be assignable by the master, to any person being a citizen of this Territory, to whom he shall, in the presence of a justice of the peace, freely consent that it shall be assigned, the said justice, attesting such free consent in writing, and shall also pass to the executors, administrators, and legatees of the master." But, by a strict and literal construction of the language employed in the first section of this statute, to which the word "contract" in the third section refers, it might be considered doubtful whether the words "negroes and mulattoes," under contract to serve another, embrace the negroes and mulattoes, registered and indentured under the act "concerning the introduction of negroes and mulattoes into this Territory," or only, negroes and mulattoes who shall come into this Territory under "contract to serve another." But when it is recollected, that the convention supposed that there were several laws on the subject of indentured and registered servants, I have no hesitation in concluding, that the act concerning servants embraced indentured servants. It is also a rule in the construction of statutes, that the sense which "the contemporaneous members of the profession had put upon them, is deemed of some importance, according to the maxim that *contemporanea expositio est fortissima in lege*." 1 Kent's Com., 434. I have been informed, that the members of the bar always understood the act concerning servants, had application to indentured and registered servants, and upon that opinion, the community at large have supposed that these persons might be sold, with the consent of the servants, and that they went to the administrator in the course of administration. It is a further rule in construing statutes, that "several acts *in pari materia*, and relative to the same subject, are to be taken together and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system. This rule applies, though some of the statutes may have expired, or are not referred to in the other acts. 1 Kent's Com., 433. The first legislature, after the adoption of the constitution of this State, in the act entitled "an act respecting free negroes and mulattoes, servants and slaves," passed 30th March, 1819, have adopted the third section of the "act concerning servants" *verbatim*, though from the context, it does not appear that any contract of service is before spoken of. This section of the act of 1819 cannot have any object or meaning, unless it have reference to the indentured and registered servants, mentioned in the constitution. I thence conclude, that the third section of the act "concerning servants," and the 11th section of the act of 1819, em-

Phoebe v. Jay.

brace indentured and registered servants, and consequently, upon the death of Joseph Jay, the plaintiff went to the administrator as assets. The third objection to the plea is, that it is uncertain whether the defendant claims the service, in virtue of his being administrator, or heir. This objection is, I think, fatal. The plea, in this respect, is wholly indefinite. If the defendant claims the plaintiff in his character as heir, there is no law to sanction the claim. If the services of the plaintiff are to be considered as property, by the common law, they would go as assets to the administrator, and the statutes that I have referred to, give the same direction. Should the party claim the defendant as administrator, still, the plea would be bad, as an administrator would only have the custody of the plaintiff for safe keeping, until her time of service could be sold; as administrator, he had no power to compel the plaintiff "to attend to the ordinary business of him, the said defendant." On the ground, that the plea is too uncertain, as to the character in which the defendant claims the services of plaintiff, and upon the further ground, that in neither capacity can the defendant claim her services, the judgment must be reversed. The plea is also defective, in point of form, for not answering the wounding. It was urged on the argument, that plaintiff, having demurred to defendant's plea, and having subsequently withdrawn it, and replied, upon the demurrer's being overruled in the court below, it is now too late to object to the plea. The withdrawing the demurrer is as if it had never been put in; consequently, when a good declaration is filed, the defendant must interpose a good bar, or else the plaintiff is entitled to recover. It is a rule of pleading, that "a demurrer by either party has the effect of laying open to the court, not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of the law." 1 Saund. 285 (n. 5). And "if two or more of the pleadings be bad in substance, the court will give judgment against the party who committed the first fault." Archbold's Civil Pleadings, 351. Therefore, notwithstanding the plaintiff's replication may be bad, of which I give no opinion, if the plea also be bad, judgment must be for plaintiff. I am of opinion, that judgment must be reversed with costs, and that the proceedings be remanded to the Randolph Circuit Court, with liberty to defendant to amend his plea, on payment of the costs occasioned thereby. (a)

Judgment reversed.

Baker, Breese, and Cowles, for plaintiff in error.

McRoberts, Young, and T. Reynolds, for defendant in error.

(a) Slavery cases in Illinois, under the ordinance, constitution, and laws. *Bailey v. Cromwell*, 8 Scam. R., 72; *Hone v. Ammons*, 14 Ill. R., 32; *Thornton's case*, 11 *ibid.*, 335; *Jarrot v. Jarrot*, 2 Gilman. R., 27; *Kinney v. Cook*, 3 Scam. R., 232; *Bailey v. Cromwell*, *ibid.*, 72.

Duncan v. Ingles.

Kimmel v. Schwartz.

DUNCAN v. INGLES.

Breese R., 215.

Appeal from Jackson.

If a defendant at law has a good defence, but cannot establish it in the ordinary mode, he should file a bill of discovery in aid of his defence, and if he fails to do so he cannot be relieved in equity against the judgment at law.

*Judgment affirmed.**D. Blackwell*, for appellant.*Cowles*, for appellee.

KIMMEL v. SCHWARTZ.

Breese R., 216.

Error to Jackson.

1. To take a case out of the statute of limitations, it is not sufficient to prove that the defendant, after the bar attached, promised to pay; but the plaintiff, in addition, must prove the original indebtedness.
2. A promise to pay a debt barred by the statute of limitations only removes the bar of the statute, and leaves the plaintiff to prove the debt, as though the statute had not been pleaded.
3. The promise to pay must be absolute and unqualified; it cannot be extended by implication. No presumptions will be indulged in to support it.
4. The court may discharge a surety for costs, in order that he may testify, provided a new surety is substituted.

THIS was an action of *assumpsit*, for goods, wares, and merchandise, sold and delivered, money lent and advanced, and on an account stated, brought in the Jackson Circuit Court, by Schwartz against Kimmel. Kimmel pleaded *non assumpsit*, upon which issue was joined, and *non assumpsit* within five years. This plea was traversed and an issue to the country; jury and verdict for the plaintiff for \$2,131 31. The defendant moved for a new trial for the following reasons:

1. The suit was brought without the authority of the plaintiff.
2. The plaintiff is and has been insane since and before the pretended existence of the alleged cause of action.
3. No promise to pay within five years was proved.
4. The plaintiff never knew of the action or cause of action.
5. The verdict is against law and evidence.

The motion for a new trial was overruled. During the progress of the trial, and after the plaintiff had gone through with the testimony on his part, the defendant moved the court to exclude the evidence from the jury, and direct as in case of a nonsuit, which motion the court overruled, to which opinion of the court the defendant excepted.

Kimmel v. Schwartz.

From the bill of exceptions, the following is the testimony given on the trial by plaintiff: Eli Penrod, a witness for plaintiff, testified that about two years before the trial he was living at the defendant's house, when Mrs. Schwartz, the wife of the plaintiff, was there, and asked the defendant for money, and said that the defendant owed her for a long time; the sum asked for by Mrs. Schwartz was about \$2,500. The witness understood, from the conversation between them, that she had let defendant have notes which he had collected, and had also lent him money; that during the same conversation, defendant said he had not the money then, but that he was going to New Orleans and would get money, and when he returned, if she would send one of her boys with him to Shawneetown to prove a paper or some hand-writing, witness did not recollect which, he would pay her, to which Mrs. Schwartz replied, that the boys did not know anything about the hand-writing. The witness further stated, that at the time of this conversation, there were no persons present, but defendant, Mrs. Schwartz, and witness, and he does not know whether she had any papers in her hands or not; that she was there about half an hour.

Susannah Will testified that she went in company with Mrs. Schwartz to see defendant, and that Mrs. Schwartz told defendant, in the presence of witness, that he owed her the sum of \$2,500, and that she wanted it. To which the defendant replied, yes, but said he had not the money to pay her. The time of this conversation was about four years before the commencement of the suit. This witness also stated, that about two years thereafter, defendant was at her, witness', husband's house, and in a conversation with witness, defendant said that he had rented a house in Arkansas for a tavern, and wanted Mr. Will to move there and keep a tavern, and said he would try to make up for Mrs. Schwartz \$500 or \$600. Witness further stated, that Mrs. Schwartz was the sister of defendant, and that her husband, the plaintiff, had never been in this State; that Mrs. Schwartz, with the family, had lived in it about seven years, apart from the plaintiff, and that she understood that this claim on defendant was for money that Mrs. Schwartz had lent him.

Conrad Will testified, that in the year 1817 he had a settlement with defendant, at Kaskaskia, in which he fell in defendant's debt, and Mrs. Schwartz said she would take witness for her debtor, and credit defendant with the amount on the \$1055 which she had let defendant have at Pittsburg, which arrangement the defendant agreed to. He also understood from Mrs. Schwartz that this \$1055 had been settled.

Kimmel v. Schwartz.

George Schwartz, the son of the plaintiff, testified, that in the month of August, 1824, shortly before the commencement of this suit, he went to the defendant and asked him for the sum of \$2,132 37½, which the defendant was owing them. To which defendant replied, that that was the sum, but said also, that he had settled it with George Kimmel; that the demand against defendant for said sum of money was created twelve or thirteen years ago; that his mother, when in Pennsylvania, had frequently let defendant have money; that the amount now claimed was loaned to defendant by his mother, the plaintiff's wife. On his cross-examination, he stated, that the plaintiff lived in the State of Pennsylvania, and had not been in his right mind or capable of doing business since the year 1810; that this suit was commenced by direction of his mother, who has lived in this State for about seven years, and has been in the habit of transacting business for plaintiff's family both before and since she came to this State. This witness was objected to, on the ground that he was the security for the costs of the suit, but the court permitted him to be released, and another security substituted. Judgment being rendered on the verdict against the defendant, he sued out a writ of error, and assigned for error,

1. The refusal of the court to exclude the testimony and direct the nonsuit.

2. In permitting the security for the costs to be released and become a witness.

LOCKWOOD, J.—This was an action of *assumpsit*. The defendant below pleaded *non assumpsit* and the statute of limitations. On the trial of this cause, after the plaintiff, Schwartz, had gone through with his testimony, the defendant moved the court to charge the jury that the testimony was insufficient, which instruction the court refused to give, and a bill of exceptions was tendered and signed, containing all the testimony given in the cause.

The testimony is very loose, confused, and contradictory. After a careful perusal of it, the mind is left without any satisfactory conclusion as to the real merits of the case. The duty of the court, in a case thus situated, is very difficult. We are, however, satisfied that injustice has been done, and that the cause ought to be presented to another jury.

In a recent case, decided in the Supreme Court of the United States, they were of opinion that proof that defendant had promised to pay a debt, barred by the statute of limitations, is insufficient, without evidence of the original consideration of the indebtedness. The promise

Kimmel v. Schwartz.

State Bank of Illinois v. Moreland.

to pay a debt barred by the statute only removes the bar, and leaves the case to be proved as if no statute of limitations had been pleaded. The evidence on this point is very defective. It is impossible to gather from the proof the precise nature of the original debt. Without some clear and distinct evidence of the existence of the original demand, it was the duty of the court to have sustained the defendant's motion for a nonsuit, or given the instructions.

As this case will have to go to another jury, the court lay down the following as the rule heretofore adopted by this court, as to what proof is required to take a case out of the statute.

The promise to pay must be absolute and unqualified, and is not to be extended by implication or presumption beyond the express words of the promise.

Several other objections have been raised to the proceedings in this cause, but the court do not deem any of them of sufficient importance to be commented upon, except the objection that the court suffered the security for costs to be discharged, and new security taken, and then permitted the discharged security to testify. This was correct. Security for costs is in the nature of special bail, except the liability is not so great, yet bail are often discharged in order to obtain their testimony.

The judgment must be reversed with costs, and the cause remanded to the Jackson Circuit Court, where a *venire de novo* must be awarded.

Judgment reversed.

Eddy and Breese, for plaintiff in error.

Baker, for defendant in error.



STATE BANK OF ILLINOIS v. MORELAND.

Breese R., 220.

Error to Gallatin.

A *scire facias* to foreclose a mortgage will lie, though there is no express promise in the mortgage to pay the money—an indebtedness *dehors* the deed may be averred and proven.

Eddy, for plaintiff.

Judgment reversed.

Adams v. Smith.

Clark v. Roberts.

Betts v. Menard.

Ankeny v. Pierce.

ADAMS v. SMITH.

Breese R., 221.

Error to Franklin.

1. A CONSTABLE, under an execution against goods and chattels, cannot enter upon land, and levy upon fruit trees standing and growing upon the premises.

2. *Quære.* Are nursery trees a part of the freehold?

3. The refusal of a new trial cannot be assigned for error.

Judgment affirmed.

McRoberts and *Hubbard*, for plaintiff.

Cowles, for defendant.



CLARK v. ROBERTS.

Breese R., 222.

Error to Montgomery.

IF an affidavit in attachment does not strictly comply with the requisitions of the statute, the attachment will be quashed on motion.

Judgment reversed.

McRoberts, for plaintiff.

Cavalry, for defendant.



BETTS v. MENARD.

Breese R., 223.

Appeal from Randolph.

1. A LAW will not ordinarily be construed retrospectively.

2. Under the administration law of 1823, judgments are preferred over other debts.

Judgment reversed.

Breese, *Cowles*, *Baker*, and *T. Reynolds*, for appellant.

McRoberts, *Young*, and *J. Reynolds*, for appellee.



ANKENY v. PIERCE.

Breese R., 225.

Appeal from Jackson.

A promissory note is not even *prima facie* evidence of a settlement of other demands which existed anterior to its execution between the same parties.

LOCKWOOD, J.—Pierce sued Ankeny, in the Jackson Circuit Court,

Ankeny v. Pierce.

on a promissory note. The defendant below pleaded payment, and on the trial of the cause, proved an account for goods sold and delivered previous to the execution of the note.

Whereupon, the plaintiff below moved the court to instruct the jury, "that the execution of the note sued on, was evidence of a settlement of all demands due from plaintiff below, to defendant below, up to the date of the note, unless the defendant had shown, by evidence, that the demands were not settled at the execution of the note;" which instructions the court gave, and the defendant below excepted, and brought the cause into this court by appeal. The only question presented to this court for its decision, is, whether the instruction prayed for ought to have been given? In a case, where the only proof consists of the production of a note on the one side, and evidence of an account, anterior to the date of the note, on the other side, it is very difficult for the court to lay down with precision any general rule applicable to such cases. The court have not been referred to any adjudged cases, or any principle of law, analogous to such a state of facts, nor have they been able to find any authority on the subject. The court, therefore, in the absence of authority, must decide this question agreeably to the dictates of justice and common sense. A knowledge of the manner in which men generally transact their business, is necessary, in arriving at a correct conclusion to the question presented in this case. Experience informs us, that notes are frequently given, as the consideration for a particular trade, without any reference to the situation of the accounts between the parties—leaving them to be settled at some future time, or in some particular manner. And notes, also, are given, on the settlement of accounts, and for the balance due on such settlement. Is there, then, in the dealings among mankind, sufficient uniformity in relation to the execution of notes, to authorize the court to decide, that a legal presumption is thereby raised, that all previous demands are released or settled? The court believe, from their experience and observation, that injustice would too often be done, if they should sanction such a general rule.

It is safer to require a party, who resists a demand, upon the ground that it has been settled or paid, to prove in what manner it was paid. Slight evidence would, doubtless, be sufficient in this case, to warrant a jury in raising a presumption, that the account was settled when the note was executed, but without any proof of a settlement of accounts and a balance struck, it is presuming too much, to justify the court in deciding, "that the execution of the note was evidence of a settlement of all demands due from plaintiff to defendant." The

Ankeny v. Pierce.

judgment must, therefore, be reversed with costs in this court, and the cause remanded, with directions to the court below to award a *venire de novo*.

Judgment reversed.

Cowles, for appellant.

Baker, for appellee.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1829.

PRESENT :

WILLIAM WILSON, CHIEF JUSTICE.	
THOMAS C. BROWNE,	}
SAMUEL D. LOCKWOOD,	
THEOPHILUS W. SMITH,	
	ASSOCIATE JUSTICES.

TYLER *v.* THE PEOPLE.

Breese R., 227.

Error to Jefferson.

It is not larceny to appropriate to one's own use, goods or chattels found in the highway, where the owner is unknown, and there are no marks, brands, or other *indicia* of ownership upon the property. (a)

Judgment reversed.

Gatewood, for plaintiff.

Eady, for defendants.

(a) *Vide* Lane *v.* People, 5 Gilm. R., 306.

VERNON *v.* MAY.

Breese R., 229.

Error to Madison.

THE refusal of the court below to grant a new trial, cannot be assigned for error in the appellate court.

Judgment affirmed.

Starr, for plaintiffs.

Turney, for defendant.

Cromwell v. March.

CROMWELL v. MARCH.

Breese R., 230.

Error to Morgan.

1. Under the act of January 6, 1827, an agreement to arbitrate a matter not pending in action, must make the "submission," and not the "award," a rule of court.
2. Where this requirement is not complied with, a judgment upon the award is erroneous, and must be reversed.
3. But the submission may be regarded as a common law obligation, and enforced accordingly.

LOCKWOOD, J.—The facts of this case are, that March and Cromwell, having several matters of difference, agreed to arbitrate the same, and in their agreement, is the following clause, to wit: "Which award is to be entered of record, and made a rule of court at the next term of the Morgan county Circuit Court, and which award, when entered, is to have the force and effect of a judgment." Subsequent to the making of the award, March served notice of his intention to apply for a judgment on the award, and the Circuit Court of Morgan county gave judgment by default, at the April term, 1829, on the award. A writ of error has been brought to reverse this judgment. Several errors have been assigned, but the court only deem it necessary to decide, whether the Circuit Court had jurisdiction over the case, so as to give any judgment on the award. By the "act regulating arbitrations and awards," passed January 6th, 1827, it is enacted, that "where persons are desirous to terminate disputes by arbitration, agree that their submission to arbitrate, shall be made a rule of the Circuit Court," and "insert such, their agreement, in the submission, or in condition of the bond or promise;" which agreement on producing an affidavit of the due execution thereof, and filing it in court, may be entered of record, and a rule of court shall thereupon be made, that the parties shall submit to, and be finally concluded by such arbitration. It is further enacted, "that where the award shall be for the payment of money only, the same being returned into, and accepted by the court, judgment shall be rendered thereon for the party in whose favor the award is made, to recover the sum awarded to be paid to him, together with the costs of arbitration, and the costs of court," etc. It is contended, that the agreement, that the "award" shall be made a rule of court, does not bring the case within the statute. The English statute on this subject contains the same phraseology, "that the consent expressed in the bond or agreement, must make the *submission* a rule of court," and under their statute it was decided, if the agreement be to make the award a rule of court, it is not within the act. 2 Sellon's Practice, 244, cites Strange, 1178. Upon the autho-

Cromwell v. March.

Humphreys v. Collier.

Ingalls v. Allen.

city of this case, the court are of opinion, that the Circuit Court of Morgan county erred in taking cognizance of the case. The judgment must therefore be reversed with costs. In giving this judgment, the court do not express any opinion as to the validity of the award. The arbitration and award, will therefore stand, and the rights of the parties under them, in the same manner as if no judgment had been rendered on the award.

*Judgment reversed.**Breese and McConnell*, for plaintiff in error.*W. Thomas*, for defendant in error.

HUMPHREYS v. COLLIER.

Breese R., 231.

Appeal from Randolph.

1. THE *lex loci contractus* must govern as to the liability of the assignor of a promissory note.

2. If the *lex loci* requires diligence by suit, such diligence must be proved by the record.

3. If diligence is to be excused by showing that a suit would be unavailing, and the proof in support of this excuse is a *legal insolvency* of the maker, it must be shown by the record of insolvency. Oral evidence is inadmissible.

4. The court has no power to instruct a jury as to the *weight* of evidence.

*Judgment reversed.**Hall*, for appellant.*Breese*, for appellees.

INGALLS v. ALLEN.

Breese R., 233.

Appeal from Morgan.

1. IN slander, the words must be proved as alleged in the declaration.

2. Where the declaration charges a positive slander, and the proof is in the disjunctive; one branch of the slanderous words imputing a crime, and the other an act which may be innocent, the declaration cannot be sustained.

*Judgment reversed.**McRoberts*, for appellant.*McConnell and Thomas*, for appellee.

Sims v. Klein.

Doe v. Hill.

SIMS v. KLEIN.

Breese R., 234.

Appeal from Morgan.

1. FRAUD vitiates every contract.
2. Every false affirmation does not constitute a fraud.
3. A plea to an action upon a note, alleging that the consideration of it was that the plaintiff affirmed that he was the owner of certain hogs and cattle, and that they were worth \$300, when in truth and in fact the plaintiff did not at the time own so many hogs and cattle, and they were not worth the sum named, is bad on demurrer, because it does not aver that the plaintiff used any means to circumvent and defraud the defendant.
4. A plea of fraud must specify the acts of fraud; a general allegation is insufficient.
5. A plea of failure of consideration must show wherein the failure consists.
6. The Illinois statute enumerates four grounds of defence to a promissory note: 1, No consideration; 2, A total failure of the consideration; 3, A partial failure of the consideration; and 4, Where fraud and circumvention have been used in obtaining the note.

Judgment reversed.

DOE v. HILL.

Breese R., 236.

Agreed Case from Monroe.

1. In ejectment the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness or insufficiency of the adversary right.
2. Where, in an action to try the right, the title of each party is derived from a common source, neither party can dispute the origin of their common title.
3. Virginia was originally the owner of the northwestern territory.
4. Virginia ceded her title to the United States, March 1, 1784.
5. In the deed of cession, the then inhabitants were entitled to a *confirmation* of their possessions and titles, without reference to their validity under the laws of France, from whence their rights were originally derived.
6. Congress, in accepting the cession from Virginia, obligated itself to *confirm* and secure these possessions and titles to the occupant or inchoate owner.
7. A revolution, conquest, treaty, cession, or other act, cannot, without express terms, divest the rights of the owners or possessors of the soil.
8. Equity impels the existing government, which derives a general title to the soil of a State, province, or territory, to make provision for the security of the *private rights* of the inhabitants of a conquered, revolutionized, or ceded country.
9. And when the new government legislates to confirm the title of the inhabitants of such a country, every intendment will be made in behalf of the inhabitants in construing the act and all subsequent grants.
10. A subsequent *floating* grant by the new government will not be so construed as to interfere with the *ancient rights* of the inhabitants.

Doe v. Hill.

11. The courts, in construing the subsequent grant, will look to the documentary history of the new government, in order to ascertain its intention as to the ancient rights.
12. Where an Act of Congress authorizes the governor of such newly-acquired territory to examine and *confirm* the titles of the ancient settlers, his deed of confirmation is conclusive evidence of title.
13. Every executive and legislative act will be liberally construed in behalf of the original settlers.
14. Where particular settlements or districts of country are designated in the deed of cession and Acts of Congress, and a subsequent act of the federal legislature extends the right of the ancient inhabitants beyond the settlement or district, the subsequent act will be enforced by the judiciary.
15. Statutes are to be construed in *pari materia*.
16. The intention of the legislative department is to be regarded in all cases independent of the words.
17. History may be consulted in construing acts of legislation.
18. A confirmatory deed under a deed of cession and an Act of Congress dispenses with the necessity of proving any other or more ancient title in the *confirnee*.
19. A voidable estate may be confirmed.
20. The confirmer, when under a legal or equitable obligation to make a confirmation, is estopped by the deed of confirmation from disputing the title of the *confirnee*.
21. A subsequent grantee of the confirmer, with notice, express or implied, of the act of confirmation, takes his rights subject to the rights of the *confirnee*.
22. Congress cannot nullify a confirmation made by one of their agents in pursuance of law; but they have not attempted to do so in this case.
23. The chief land office of the federal government has no power to do an act contrary to law.
24. A patent or deed of confirmation from a government cannot be impeached collaterally, but only by *scire facias* or proceeding in equity.
25. A special verdict was in this case sustained.
26. A government deed of confirmation will operate as a release of title.
27. The government may be estopped by its grant, when issued in pursuance of legislative authority.
28. Presumptions will, in special cases, be indulged in against a government.
29. When the plaintiff obtains a decision of the Supreme Court in favor of his title, and the defendant has made improvements upon the land recovered, the cause, upon reversal at the instance of the plaintiff, will be remanded for further proceedings under the betterment, or occupying claimant law.
30. The governments of this country are restrained by law, and possess no *absolute* power, except such as the Constitution expressly confers upon them.

LOCKWOOD, J.—This is an action of ejectment, commenced in the Monroe Circuit Court, for the recovery of a tract of land situate in Monroe county. On the trial, a special verdict was found, which contains in substance the following facts: That on the 12th day of February, 1799, Arthur St. Clair, then governor of the territory northwest of the river Ohio, granted his deed of confirmation or patent, to Nicholas Jarrot, to the premises set out in the plaintiff's declaration, which deed of confirmation, is as follows, to wit:

"Territory of the United States northwest of the Ohio. *Arthur St. Clair*, governor of the territory of the United States northwest of the Ohio, to all persons who shall see these presents, greeting:

"KNOW YE, that in pursuance of the acts of Congress of the 20th of June, and 28th of August, 1788, and the instructions to the governor of the said territory, of the 20th of August of the same year, the titles and possessions of the French and Canadian inhabitants, and other settlers in the Illinois country, and at St. Vincennes, on the Wabash, the claims to which have been by them presented, have been duly examined into, and Nicholas Jarrot lays claim to a certain

Doe v. Hill.

tract or parcel of land, lying and being in the county of St. Clair, and bounded in manner following, to wit: (here the governor's confirmation sets out the boundaries :) to which, for anything appearing to the contrary, he is rightfully entitled, as assignee of Philip Angel. Now, to the end, that the said Nicholas Jarrot, his heirs and assigns, may be forever quieted in the same, I do, by virtue of the acts and instructions of Congress before-mentioned, confirm unto Nicholas Jarrot, his heirs and assigns, the above described tract or parcel of land, lying and being in the county of St. Clair, and containing 778 acres and 131 perches, together with all and singular, the appurtenances whatsoever, to the said described tract or parcel of land with the appurtenances, to him, the said Nicholas Jarrot, to have and to hold, to the only proper use of the said Nicholas Jarrot, his heirs and assigns forever: saving, however, to all and every person, their rights to the same or any part thereof, in law or equity, prior to those on which the claim of the said Nicholas is founded.

"In testimony whereof, I have hereunto set my hand, and caused the seal of the territory to be affixed, at Cincinnati, in the county of Hamilton, on the 12th day of February, A.D. 1799, and of the Independence of the United States the 23d.

"ARTHUR ST. CLAIR.

"Registered: *William H. Harrison*, secretary of the territory. Recorded 19th of October, 1804."

The verdict further finds, that on the second day of January, 1801, Jarrot conveyed the above-mentioned premises, by deed of bargain and sale, to one George Lunceford. That the lessors of the plaintiff, are the only heirs at law of said George Lunceford; that the premises mentioned in the governor's confirmation, were surveyed by Daniel McCann, who was lawfully authorized to survey such claims, and was afterward surveyed by Wm. Rector, deputy surveyor of the United States, for the said George Lunceford, prior to the year 1812. The jury also find, that after the above-recited confirmation and surveys were made, that the board of commissioners at Kaskaskia, who were empowered by the act of Congress, bearing date the 20th day of February, 1812, to revise and reexamine the confirmations to land made by the governor of the Northwest Territory, did, in pursuance of the said act, after an examination of the said claim, make a report thereon to the government of the United States, whereupon, the government of the United States, by its proper officers, did reject the same.

The jury also found, that the said premises were afterward exposed to public sale by the government of the United States, and that the

defendant, Samuel Hill, became the purchaser of about 320 acres thereof, and has paid therefor, and obtained a patent from the United States.

Now, if the court should be of opinion, that the law of the case is with the defendant, then the jury find him not guilty; but if the court should be of opinion, from the whole statement of facts here found, that the law is in favor of the plaintiff, then the jury find the defendant guilty of the trespass in the declaration mentioned, and assess the plaintiff's damages at one cent. On this verdict, the Circuit Court rendered judgment for the defendant, and the cause is brought into this court by consent. On the part of the plaintiff, it was contended:

1. That the governor had *full power* to make the confirmation, and thereby, a title in fee simple in the premises, was vested in Nicholas Jarrot, which no subsequent act of the government of the United States, could divest.

2. That Congress had, by their legislation, recognized the confirmations, and thereby had, if there was any defect of power in the governor, made his acts valid.

On the part of the defendant, it was urged:

1. That the governor had no power to make the confirmation.

2. That he had exceeded his authority.

3. That Congress have the power, admitting the governor acted in pursuance of law, to nullify his acts.

4. That the verdict is defective, because it does not appear that the premises lie within the limits prescribed by the resolution of Congress, passed in 1788; and

5. Because the verdict does not find that plaintiff had a previous estate, for the confirmation to act on.

I propose to examine the correctness of the several positions advanced by the counsel for each of the parties. It was conceded on the argument that the United States were the original proprietors, and the source from whence the title of both parties were derived to the premises.

It is a principle in the action of ejectment, that, let the defendant's title be ever so defective, still, it is incumbent on the lessors of the plaintiff to furnish evidence of a good title in themselves. Has such evidence been produced? In order fully to understand the nature of the title exhibited on the part of the lessors, it will be necessary to take a concise view of the history of this country, and the legislation growing out of it.

The whole territory north of the river Ohio, and west of Pennsylvania, extending northwardly to the northern boundary of the United

States, and westwardly to the Mississippi River, was claimed by Virginia, to be within her chartered limits, and during the Revolutionary war, her troops conquered the country, and Virginia came into the possession of the French settlements situated on the Mississippi River. New York, Connecticut and Massachusetts, also claimed portions of the same territory. Other States, whose limits contained but small portions of waste and uncultivated lands, contended, that a portion of the uncultivated lands claimed by Virginia, New York, etc., ought to be appropriated as a common fund to pay the expenses of the war. Congress, to compose these conflicting claims and opinions, recommended to the States, having large tracts of waste unappropriated lands in the western country, to make a liberal cession to the United States of a portion of their respective claims, for the common benefit of the Union. Virginia, in pursuance of this recommendation, on the 1st of March, 1784, yielded to the United States, all her right, title and claim to the territory northwest of the river Ohio, upon certain conditions.

One of the conditions contained in the deed of transfer from Virginia to the United States, and acceded to by the United States, is as follows: "That the French and Canadian inhabitants, and other settlers of the Kaskaskias, St. Vincents, and the neighboring villages, who have professed themselves citizens of Virginia, shall have their *possessions and titles confirmed* to them, and be protected in the enjoyment of their rights and liberties." The acceptance on the part of the United States, of the deed transferring this country, imposed on them the duty, to have the *possessions and titles* of the inhabitants of the country, *confirmed* to them; but no steps were taken by Congress, relative to this subject, until the year 1788, when George Morgan and his associates presented a memorial to Congress, proposing to purchase a large tract of land in Illinois, on the Mississippi River, including all the French settlements on that river, and the premises in question.

On this memorial, a committee of Congress made a detailed report to that body, on the 20th June, 1788, which was agreed to by Congress, and thereby, the recommendations of the report became a law, such being the manner in which Congress, under the confederation, enacted laws. See 1st vol. Laws of United States, 580.

The committee, in their report, say, that "they are of opinion, that from any general sale which may be made of the lands on the Mississippi, there should, at least, be a reserve of so much land, as may satisfy all the just claims of the ancient settlers on that river, and that they should be confirmed in the possession of such lands, as they may

have had at the beginning of the late revolution, which have been allotted to them, according to the laws and usages of the governments under which they have respectively settled." The committee then recommend, that separate tracts be reserved, embracing within their limits all the claims of the inhabitants, as was supposed, for satisfying the "claims of the ancient settlers," and for donations, "for each of the families *now living* at either of the villages of the Kaskaskias, La Prairie du Rocher, Kahokia, Fort Chartres, and St. Phillips."

They further recommended, "that measures be immediately taken for confirming, in their possessions and titles, the French and Canadian inhabitants, and other settlers on those lands, who, on or before the year 1783, had professed themselves citizens of the United States, or any of them, and for laying off the several tracts which they might rightfully claim, within the described limits." The report concludes as follows: "That whenever the French and Canadian inhabitants, and other settlers aforesaid, shall have been *confirmed* in their possessions and titles, and the amount of the same ascertained, and the three additional parallelograms for future donations, and a tract of land one mile square on the Mississippi, extending as far above, as below Fort Chartres, and including the said Fort, the building and improvements adjoining the same, shall be laid off; the whole remainder of the soil, within the reserved limits above described, shall be considered as pertaining to the general purchase, and shall be conveyed accordingly." "That the governor of the western territory, be instructed to repair to the French settlements on the Mississippi, at and above the Kaskaskias: That he examine the titles and possessions of the settlers, as above described, in order to determine what quantity of land they may severally claim, which shall be laid off for them, *at their own expense*; and that he take an account of the several heads of families, living within the reserved limits, in order that he may determine the quantity of land that is to be laid off in the several parallelograms, which shall be laid off accordingly by the geographer of the United States, or his assistant, at the expense of the United States."

This report was, subsequently, re-committed to a committee, who, on the 28th of August, 1788, reported to Congress some alterations in the terms of the contract between Morgan and his associates, and the United States, but no essential variations were made in relation to the French and other settlers on the land, except as follows: "That in case there are any improvements, belonging to the ancient French settlers, without the general reserved limits, the same shall also be considered as reserved for them in the sale now proposed to be

made." This report was adopted by Congress. It may be here remarked, that the contemplated sale to Morgan and others was never effected. On the report of another committee, instructions were given by Congress to the governor of the western territory, dated 29th of August, 1788, from which I make the following extracts:

"SIR: You are to proceed without delay, except while you are necessarily detained by the treaty now on hand, to the French settlement on the river Mississippi, in order to give dispatch to the *several measures* which are to be taken, according to the *acts* of the 20th June last, and the 28th inst., of which a copy is inclosed for your information." "When you have examined the titles and possessions of the settlers on the Mississippi, *in which they are to be confirmed*, and given directions for laying out the several squares, which the settlers may decide as they shall think best among themselves, by lot, you are to report the whole of your proceedings to Congress."

Whether the governor took any immediate steps to perform the duties enjoined on him by this letter of instructions, and the acts of Congress of the 20th June and 28th of August, 1788, does not appear from the verdict, and I am not acquainted with any public document, to ascertain the fact. But, that Congress did not consider, that the power of the governor should cease upon his failure to "proceed without delay" to attend to his business, is evident from the act of Congress, entitled, "An act for granting lands to the inhabitants and settlers at Vincennes, and the Illinois country, in the territory northwest of the Ohio, and for confirming them in their possessions," passed 3d March, 1781.

From a hasty perusal of this act, it might be inferred, that it was intended as a substitute for the acts of the 20th June, and 28th August, 1788, and, consequently, a virtual repeal of them. I am, however, satisfied from a careful perusal of the act, that such was not the intention of Congress, but that this act was intended to embrace cases, not included in the former acts, and repeals a part of the act of 28th August, 1788. That this is the object of this act, will appear from the following abstract of the different sections: Section one, gives 400 acres to each of those persons, "who, in 1783, were heads of families at Vincennes, or in the Illinois country on the Mississippi, and who, since that time, have removed from one of the said places to the other." This section gives the donation, notwithstanding a removal from one place to another. By the second section, heads of families at Vincennes, and the Illinois country in 1783, who afterward removed without the limits of the territory, are, notwithstanding, entitled to the donation of 400 acres, made by a resolve

of Congress, on the 29th of August, 1788, and the governor is directed to "cause the same to be laid out, for such heads of families or their heirs, and to cause to be laid off and confirmed to such persons, the several tracts of land which they may have possessed, and which, before the year 1783, may have been allotted to them, according to the laws and usages of the government under which they may have respectively settled. *Provided*, That if such persons, or their heirs, do not return and occupy the said land within five years, such land shall be considered as forfeited to the United States."

One branch of this section gives the donation of 400 acres, notwithstanding the settler had moved out of the territory; and the other branch, authorizes a confirmation of lands that may have been possessed, according to the laws and usages, by allotment, but without a legal title to the fee. But in both cases, the grant to be forfeited, in case the settler or his heirs, do not return and occupy said lands, in five years.

This section cannot be considered a compliance with the obligation resting on Congress, to *confirm* the French settlers in their *possessions and titles* in pursuance of the deed of cession from Virginia. The confirmation contemplated by the cession, was an absolute assurance of the land to these persons, whether they occupied them or not. The third section of the act relates to other matters.

The fourth section is as follows: "That where lands have been *actually improved and cultivated*, at Vincennes, or in the Illinois country, under a *supposed* grant of the same, by any commandant or court, claiming authority to make such grant, the governor of the said territory, be, and he is hereby empowered, to confirm to the persons who made such improvements, their heirs or assigns, the lands *supposed* to have been granted as aforesaid, or such parts thereof, as he, in his discretion, may judge reasonable, not exceeding, to any one person, 400 acres." This section, evidently embraces only such cases as from defect of power in the granting authority, left the settler without any valid title to support his possession, and, hence, it only operates on cases where the settler had actually improved and cultivated the land, and limits the extent of the confirmation to 400 acres. This, clearly, is not the confirmation contemplated by the deed of cession. The deed of cession intended to secure the inhabitants in their titles, whether they cultivated the land or not, and whatever might be the extent of their claim. This section, then, does not embrace the possessions and titles contemplated by the deed of cession. The 5th, 6th and 7th sections, relate to other matters.

The eighth, and last section, repeals, "so much of the act of Con-

gress of 28th August, 1788, as refers to the location of certain tracts of land directed to be run out, and reserved for donations to the ancient settlers in the Illinois country ;” and “ the governor of the said territory, is directed to lay out the same, agreeably to the act of Congress of the 20th of June, 1788.” This section clearly recognizes the act of 20th June, 1788, as in full force. From this review of the act of 1791, it will be perceived, that all its provisions are in addition, and not repugnant to, nor in lieu of, the provisions of the act of the 20th of June, 1788.

That portion of the act of 1788 that relates to the confirmation of the titles of the settlers, was in compliance with the obligation of duty ; the act of 1761 was prompted by a spirit of liberality toward persons who had recently, by the fate of war, become subjects and citizens of a government to which they were strangers, and was, no doubt, intended to conciliate and secure their attachment to the United States. If, then, the act of June 20th, 1788, is to be regarded as in force, notwithstanding the act of 1791, what power did it confer on the governor of the Northwestern Territory ? Doubtless, upon the change that was effected in the government, when the French settlements were conquered by the troops of Virginia, many fears would be excited in the minds of the inhabitants, that the grants that had been made to them by the French and British governments, would not be recognized by their conquerors. To allay any such fears, was probably the reason that induced Virginia to require the confirmations of the titles and possessions of the French settlers ; and to effect so desirable an object, some act was required to be performed *in pais*, which would completely quiet all apprehensions. Could this be done by anything short of an acknowledgment, on the part of the United States, that they never would disturb such titles and possessions, as their agent should determine to be valid ? A deed of confirmation, or patent, would release all the interest of the United States in the titles and possessions of the settlers, and effectually answer the wise and benevolent object that Virginia, doubtless, had in view, in requiring that the United States should confirm these titles and possessions.

That Congress intended to clothe the governor with power to make confirmations of the possessions and titles of the French inhabitants of the Illinois country, is sufficiently apparent, from the language of the acts and instructions of 1788. Should any doubt, however, exist on the subject, the act of 1791, being a subsequent exposition of their intention and meaning, would remove it. By the fourth section of the act of 1791, “ where any lands have been actually improved and

cultivated, at Vincennes, or in the Illinois country, under a *supposed grant* of the same, by any commandant or court claiming authority to make such grant, the governor of the said [northwest] territory, hereby is empowered to confirm to the persons who made such improvements their heirs or assigns, the lands supposed to be granted as aforesaid, or such parts," etc.

That the governor should be empowered to confirm claims which rested on the liberality of Congress only, and not those founded on previous right, and which the United States were bound to confirm by a solemn compact, is so inconsistent with reason, that Congress ought not to be supposed to have intended any such distinction. A reference to this statute, being *in parimateria*, is proper, to ascertain the probable intention of Congress, if the acts and instructions of 1788, are not sufficiently clear in themselves.

That other statutes on the same subject, may be consulted in construing what is doubtful, see 4 Bac. Abr., 647, 1 Kent's Comm., page 433.

The intention of the legislature should also be regarded, though seeming to vary from the letter. 4 Bac. Abr., 643. From the letter and spirit, then, of the acts of 1788, and the instructions of the same year, it appears sufficiently clear, that the governor had power to make deeds of confirmation to the French, and other inhabitants of the Illinois country.

These deeds of confirmation, must also be considered, at least, as *prima facie* evidence that they were rightfully made. The governor was authorized to confirm to the settlers their possessions and titles, and if his acts are not to be regarded, *prima facie*, as honestly and fairly done, what benefit would result to the settlers?

If, in order to show their deeds of confirmation, they must first give evidence of the title to their land, then the confirmations of the governor would be a farce, and the settlers would have been at the expense of surveying their lands for no useful purpose. But in truth, these confirmations were to be a benefit to the United States, as well as to the settlers. For, by the settlers surveying their lands, and exhibiting their claims to the governor, the United States became apprised of the extent of those claims, and were thus enabled to ascertain what lands remained to them subject to be sold. It was a convenient mode of dividing the lands of individuals, from the lands of the nation, and as an inducement for the settlers to survey their claims, and adduce their titles to the governor, he was authorized, should he, upon examination, find them honest and fair, to relinquish all claim on the part of the United States to those lands. "A con-

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firmation, at common law, is of a nature nearly allied to a release, and is a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or, whereby a particular estate is increased." 2 Bl. Com., 325. Upon this definition of a confirmation, the *confirmor*, or those claiming under him, would not be permitted to deny the preëxisting estate in the *confirree*. The *confirmor*, and those claiming under him, would be estopped by his deed. But from an examination of the several acts of Congress relative to governor's confirmations, a higher character has been given them, than that of mere confirmations.

By the fourth section of the act, entitled, "An act supplementary to an act, entitled, an act making provision for the disposal of the public lands in the Indiana territory, and for other purposes," passed 3d March, 1805, it is enacted, "That the lands lying within the districts of Vincennes, Kaskaskias, and Detroit, which are claimed by authority of French or British grants legally executed, or by virtue of grants issued under the authority of any former act of Congress, by either of the governors of the northwest, or Indiana territories, and which have already been surveyed by a person authorized to execute such surveys, shall, whenever it shall be necessary to re-survey the same for the purpose of ascertaining the adjacent vacant lands, be surveyed at the expense of the United States, any act to the contrary notwithstanding." 3d vol. Laws U. S., 671. As I have been unable to find any act of Congress which gave to the governors of the Northwest Territory, any power to make "grants," except the acts of 1788, and the act of 1791, I thence infer, that the "confirmations," contemplated by those acts, were regarded by Congress in the nature of grants, so far as the United States were concerned; and if grants, a subsequent sale of the granted lands by the United States, although followed by a patent, is void. In the act entitled, "An act respecting the claims to land in the Indiana Territory and State of Ohio," passed 21st of April, 1806, the confirmations authorized by the acts of 1788 and 1791, are called "patents," and this, probably, is the more correct name by which to designate the instruments granted by the governors, under the acts of 1788 and 1791.

The second proposition of the plaintiff is, that Congress had recognized by their legislation the confirmations, and thereby, had, if there was any defect of power in the governor, made his proceedings valid. The authority of the governor to confirm the titles and possessions of the settlers under the acts of 1788, and the act of 1791, continued until the 26th of March, 1804, a period of nearly 16 years, when a board of commissioners were appointed to sit at Kaskaskia, to hear

proof relative to British and French grants, and report to the Secretary of the Treasury.

This board virtually superseded the powers of the governor. But nothing appears from the acts of Congress, in disapprobation of the proceedings of the governor, until the passage of an act on the 20th February, 1812, which authorized the register and receiver of the land office at Kaskaskia, and another person to be appointed by the President of the United States, to examine and inquire into the validity of claims to land, in the district of Kaskaskia, which are derived from confirmations made, or pretended to be made, by the governor of the Northwest and Indiana territories respectively, "and they shall report to the Secretary of the Treasury, to be laid by him before Congress at their next session, their opinion on each of the claims aforesaid." It will be recollected, that the governor was directed, by the instructions of the 29th of August, 1788, to report his proceedings to Congress, and it is fair to presume, that he kept Congress, from time to time, advised of his doings, for Congress had the subject repeatedly before them, and passed several acts, which, if they do not expressly sanction the proceedings of the governor, do so impliedly; at all events, as the governor continued to act for so long a period, with at least the tacit approbation of Congress, and his acts, remaining unimpeached for a period of more than 20 years from the time his authority commenced, and the lessor's ancestor being an innocent purchaser, the soundest principles of policy, as well as of good faith, require, that the governor's "confirmations" should be considered, at least, *primâ facie*, valid. Upon both grounds, then, the plaintiffs are entitled to recover, unless the defendant has shown an older title derived under a French or British grant, or some fact that will invalidate the deed of confirmation offered in evidence on the part of the plaintiffs. The first objection urged against the plaintiff's right to recover, is, that the governor had no power to make the confirmation. But if the views above taken are correct, the governor was authorized by the resolutions and instructions of June and August, 1788. The second objection is, that the governor exceeded his authority. It was urged in support of this objection, that if the governor had power to *confirm*, he was limited to 400 acres.

From the review, however, of the act of 1791, it appears that the limitation of 400 acres, applies only to donations and defective claims, and not to confirmations of valid preëxisting rights. The third objection is, that Congress have the power to nullify the acts of the governor, admitting he had power to make confirmations.

This position is too outrageous in a government of laws, to merit any consideration. Congress have not, however, exercised any

such power. The act of 1812, only authorized the register and receiver to inquire into the validity of the governor's confirmations, and were to report their opinion to the Secretary of the Treasury, who was to lay the same before Congress, and it does not appear, that Congress ever passed any law on the subject of those confirmations, on which the commissioners reported an unfavorable opinion. The Secretary of the Treasury, however, considered these confirmations void, and directed the sale of the land. But the secretary had no power to order the sale of any lands, except those belonging to the United States. If the governor's deeds of confirmation, or patents, were obtained by fraud or misrepresentation, the deed of confirmation or patent is good, until set aside by due course of law. The remedy of the second patentee in such cases, is, by *scire facias*, or a bill, or information in a court of chancery. See the case of *Jackson v. Lawton*, 10 Johns. Rep., 23, where it was decided, that "If a patent has been issued by fraud, or on false suggestion, unless the fraud or mistake appears on the face of the patent itself, it is not void, but voidable only, by suit for that purpose." The fourth objection is that the verdict is defective, because it does not appear that the premises lie within the limits prescribed by the resolutions of Congress, passed in 1788. The answer to this objection is, that such proof was unnecessary, for by the resolution of 28th of August, 1788, the improvements of the settlers "were reserved for them," whether "the improvements were within, or without, the reserved limits."

The last objection is, that the verdict does not find that the confirmee had a previous estate in the premises for the deed of confirmation to act on.

I am clearly of opinion, for the reasons heretofore given, that the confirmation was a release of the interest of the United States, and that the presumption was, that the deed of confirmation was made in a case authorized by the resolutions of June and August, 1788. If the governor's patent is to be considered as a technical deed of confirmation, then the confirmor, and all claiming under him, are estopped. Upon the whole, the law arising on the special verdict, being in favor of the lessors of the plaintiffs, the judgment of the Circuit Court must be reversed with costs, and the cause remanded to the Circuit Court of Monroe county, with directions to enter judgment for the plaintiffs agreeably to this opinion, and the Circuit Court of Monroe county will make such order in relation to improvements on the premises, if any there are, as the statute, and the facts of the case will warrant.

Judgment reversed.

J. Reynolds, for plaintiff.

Ford, for defendant.

Earnst v. Earnst.

McLean v. Emerson.

Duncan v. Fletcher.

EARNST v. EARNST.

Breese R., 247.

Appeal from Fayette.

THIS case arose under an *obsolete statute*, and the only points decided were,

1. That a debt due to the Old State Bank, was a debt due to the State of Illinois, and

2. That the State, by act of legislation, might *release* its own debt.

Decree reversed.

Brown, for appellant.

Cowles, for appellee.



MCLEAN v. EMERSON.

Breese R., 250.

Appeal from Gallatin.

1. *OBsolete statute.* A replevy bond, payable to the plaintiff, instead of the sheriff, is valid.

2. A replevy bond in *more* than double the amount of the judgment, as required by statute, is valid.

3. It is not error to include in the replevy bond the costs of the sheriff.

Judgment affirmed.

Eddy, for appellant.

Gatewood, for appellee.



DUNCAN v. FLETCHER.

Breese R., 252.

1. *PARTIES* may by contract, submit to an arbitration, and provide that a judgment of the Circuit Court may be entered upon the award.

2. If the parties have legal objections to the award, and fail to make them before the Circuit Court, the Supreme Court will not reverse the judgment.

3. If an award is not made under the statute, there is no necessity for swearing the arbitrator, if made under the statute the Supreme Court will presume that he was sworn.

4. Where no fraud is averred and proven, the Supreme Court will presume that the award was regular.

Duncan v. Fletcher.

5. Where the submission requires the hearing to take place, or the award to be made on a particular day, and there is no evidence as to the day when the duty was performed, the Supreme Court will presume that it was on the day named.

Judgment affirmed.

Hall, for plaintiff.

Brown, for defendant.

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF ILLINOIS,
IN DECEMBER TERM, 1830.

PRESENT :

WILLIAM WILSON, CHIEF JUSTICE.

THOMAS C. BROWNE, SAMUEL D. LOCKWOOD, THEOPHILUS W. SMITH,	}	ASSOCIATE JUSTICES.
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PHELPS v. YOUNG.

Breese R., 255.

Appeal from Adams.

1. AN attachment lies under the statute against a non-resident of the State, and no other allegation than that of non-residence is necessary in the affidavit.

2. The statute requires that the "*nature and amount*" of the indebtedness shall be stated in the affidavit. This requisition is complied with by stating that the defendant "*is indebted to the plaintiff in the sum of \$1,400 by his certain instrument of writing, signed by himself.*"

3. The declaration will aid a defective affidavit in attachment.

4. Where no objection is made to an affidavit in attachment in the inferior court, but little favor will be shown to it in the appellate court.

5. Where the evidence of a witness is material, and the party desires to take his deposition *de bene esse*, an affidavit filed in the court where the cause originated after an order changing the venue, but before the removal of the record, is legal.

6. Where a notice is given to take a deposition before a particular officer, and before the time fixed the officer dies, his successor in office may perform the duty.

Phelps v. Young.

People v. Slayton.

Rust v. Frothingham.

7. But a new notice, stating the casualty, and fixing the same day, hour, and place, mentioned in the original notice, and naming another officer who has power to administer oaths, will be sufficient, notwithstanding the apparent irregularity.

8. Upon a change of venue, but before the record is transmitted, the computation of time and distance, under the deposition act, is to be regulated with reference to the court in which the cause originated.

Judgment affirmed.

W. Thomas, for appellant.

Strode and Cavalry, for appellee.



PEOPLE v. SLAYTON.

Breese R., 257.

Error to Adams.

A SURETY is not bound by a recognizance for the appearance of the *indictée* in a criminal cause, where the latter has neither been arrested upon process, or voluntarily appeared to the indictment.

Judgment affirmed.

Forquer, for plaintiffs.

Cavalry, for defendant.



RUST v. FROTHINGHAM.

Breese R., 258.

Error to Monroe.

1. A *variance* between the writ and declaration cannot be taken advantage of upon a demurrer to the declaration.

2. Irregular or erroneous process may be quashed on motion.

3. Debt upon judgment—plea *nul tiel* record—a variance between the record and judgment cannot be determined by the Supreme Court unless the record is embodied in a bill of exceptions.

4. The record of the judgment of a sister State is *conclusive* evidence of a debt, unless it is impeached for fraud, or by a want of jurisdiction in the court which pronounced the judgment.

5. Recitals in the record of a judgment are conclusive upon the defendant. If the record shows that he appeared in person, or by attorney, or that he had been regularly served with process, he cannot by plea contradict the record, but is estopped by the recital or return.

Rust v. Frothingham.

Clark v. Ross.

Ellis v. Snider.

Wells v. Hogan.

6. An appearance by attorney is valid, though he had no authority to appear. The remedy of the party injured is against the attorney, and he cannot dispute the appearance in a collateral action.

7. In debt upon a judgment, no writ of inquiry is necessary.

Judgment affirmed.

Semple and Breese, for plaintiff.

Cowles, for defendants.

CLARK v. ROSS.

Breese R., 261.

Error to Adams.

1. AN *appeal* lies only, where the judgment is for \$20, exclusive of costs, or relates to a franchise, or freehold.

2. The same rule applies to a *writ of error*. (a)

Writ of Error dismissed.

McConnel, for plaintiff.

Cavalry, for defendant.

(a) Overruled in *Bowers v. Green*, 1 Scam. R., 42.

ELLIS v. SNIDER.

Breese R., 263.

Appeal from Union.

THE demand of the plaintiff governs the jurisdiction of a justice of the peace. Therefore,

Where the plaintiff claims only \$100, and his witness swears to a debt of more than \$100, the justice has jurisdiction.

Judgment reversed.

Breese, for appellant.

WELLS v. HOGAN.

Breese R., 264.

Error to Jo Daviess.

1. THE statute of forcible entry and detainer is contrary to the common law, and gives a *summary* remedy, and must, therefore, be construed strictly.

2. A complaint on forcible detainer must show that the relation of landlord and tenant existed between the parties.

Wells v. Hogan.

Clark v. The People.

Snyder v. Laframboise.

3. No particular form is requisite to make a valid judgment; it is sufficient if the order is final in its terms.

Judgment reversed.

Cavalry, for plaintiff.

Ford and *Strode*, for defendant.



CLARK v. THE PEOPLE.

Breese R., 266.

Error to Adams.

1. ALL courts have an incidental power to punish contempts against their authority or dignity.

2. Their power in this respect is discretionary. (a)

3. If they inflict an illegal punishment, or impose a fine in a case not authorized by law, the remedy of the injured party is by impeachment, indictment, or action of trespass.

Judgment affirmed.

McConnel, for plaintiff.

Ford, for defendant.

(a) *Contra*, Stewart v. People, 8 Scam. R., 402; Thatcher's case, 2 Gilm. R., 170.



SNYDER v. LAFRAMBOISE.

Breese R., 268.

Appeal from St. Clair.

1. In a sale of land, where the vendor is guilty of no fraud, and makes no covenants, the vendee cannot recover back the purchase money upon a failure of title.
2. The Supreme Court will not reverse a judgment, where the complaining party in the court below stands by and permits illegal evidence to go to the jury.
3. In instructing the jury, the court must be positive in its language, leaving nothing to inference whereby a jury may be misled.
4. In civil cases, where a *community* of interest and design is established against the plaintiffs or defendants in a cause, the declarations and acts of one of the plaintiffs or defendants is evidence against all of the plaintiffs or defendants.
5. The rule of *caveat emptor* applies to a vendee by *quit claim*.
6. A total failure of title constitutes no evidence of fraud.

LOCKWOOD, J.—This was an action of *assumpsit*, commenced in the St. Clair Circuit Court, by Laframboise against Snyder. The declaration contains the common money counts, to which the defendant below pleaded *non-assumpsit*. On the trial of the cause, the defendant took a bill of exceptions, containing the evidence and the charge of the judge. From the bill of exceptions, it appears that the plain-

Snyder v. Laframboise.

tiff below purchased a tract of land of the defendant and one Louis Pinçonneau, for which he paid \$150, and received from them a quit claim deed, in which it is stipulated that they do not warrant the land against the claims of any person but themselves. It was also proved that defendant below had no title to the premises. The plaintiff further proved by a witness, "That after the sale and purchase, said Pinçonneau told witness that he, said Pinçonneau, had understood plaintiff did not wish to trade with Snyder for the land, as he was afraid he, Snyder, would cheat him, being a lawyer; that plaintiff preferred trading with said Pinçonneau; that plaintiff would find that he, Pinçonneau, could cheat as well as defendant; and that Pinçonneau admitted to witness that the legal title to the said land was in the heirs of one Augustin Pinçonneau; that if plaintiff would give \$50 more, he, Pinçonneau, would make plaintiff a warranty deed, as he could let Augustin Pinçonneau's heirs have other lands for it." The defendant was not present when these statements were made by Pinçonneau. Some testimony was adduced on the part of the defendant, which it is unnecessary to notice. After the testimony was produced, the defendant moved the court to instruct the jury that if there was no fraud practised by defendant, nor any false affirmation as to his title, the plaintiff could not recover; and further, where there is no false affirmation or fraud in a sale of lands, the purchaser cannot recover back the purchase money; and that in the sale of land where there is no fraud, the maxim of *caveat emptor* applies. The court, however, instructed the jury, that if they were satisfied from the evidence that Snyder and Pinçonneau sold a title to the land, either legal or equitable, when in truth they had no title of either kind, or that they, or either of them, deceived the plaintiff as to the title, they should find for the plaintiff; but if they were satisfied from the evidence that Snyder and Pinçonneau did not deceive the plaintiff as to the nature of their title, they ought to find a verdict for the defendant. To all of which instructions the defendant, by his counsel, excepted. A verdict was found for plaintiff, and judgment rendered thereon. Several errors have been assigned, and under them it was urged that a part of the testimony ought not to have been permitted to go to the jury, and that the instructions were not such as the defendant was entitled to, and were prayed for. The court, in examining the bill of exceptions, do not find that the testimony was excepted to on the trial. If a party permits improper testimony to go to the jury without objection, the reasonable presumption is that it was received by consent. In the event that a verdict should be found on such testimony, the proper remedy is by a motion for a new trial, and the case

Snyder v. Laframboise.

must be a strong one where this court will interfere to protect a party who stands by and permits improper testimony to be given to the jury. The court feel themselves called on to condemn the practice that seems to prevail extensively, to suffer illegal testimony to be given to the jury, and then rely upon the skill of counsel to extricate his client from the effect of such testimony. This course leads to much embarrassment, and frequently presents much difficulty in distinguishing between the province of the court and jury. In this case, the court feel no hesitation in declaring that the evidence of the declarations of Pinçonneau, under the circumstances, were not evidence against the defendant, and no doubt exists that, had the court below been called on to take this evidence from the jury, it would have been withdrawn, and in that event no verdict could have been given for the plaintiff. The rule of law on this point is, that where there is a community of interest and design, the declarations of one of the parties is evidence against the rest, and this rule is not confined to cases of civil contract. It is, indeed, true, that in general the declarations or admissions of one trespasser, or other wrong-doer, is not evidence to affect any other person, for it is merely *res inter alios*; but where it has once been established that several persons have entered into the same criminal design with a view to its accomplishment, the acts or declarations of any one of them, in furtherance of the general object, are no longer to be considered as *res inter alios* with respect to the rest. They are identified with *each* other in the prosecution of the scheme; they are partners for a bad purpose, and as much mutually responsible, as to such purpose, as partners in trade are for more honest pursuits, and may be considered as mutual agents for each other. Where a unity of design and purpose has *once* been established in evidence, it may fairly and reasonably be presumed that the declarations and admissions of any one, with a view to the prosecution and accomplishment of that purpose, convey the intentions and meaning of all; and this seems to be the general rule in the case of trials for conspiracies and other crimes of a like nature.—2 Starkie on Ev., 47. It was urged on the argument, that Snyder and Pinçonneau ought to be considered as partners, and consequently the admissions of either be evidence against the other. The court, are, however, of opinion that this action cannot be sustained on this principle. The plaintiff's right to recover in this case depends upon the question, whether the defendant and Pinçonneau were guilty of fraud in selling the land mentioned in the deed. Even in equity, a vendee has no remedy on the ground of failure of title, if he has no covenants and there is no fraud. *Chesterman v. Gardner*, 5 Johns.

Snyder v. Laframboise.

Ch. Rep., 29; *Gouverneur v. Elmendorf*, *ibid.*, 79. And the fraud must exist at the time of the execution of the deed or lease, and not fraud in a subsequent and distinct transaction.

Testing this case by the above principles, there is an absence of evidence of any concerted design between Snyder and Pinconneau to defraud the plaintiff below. The declarations of Pinconneau, being made subsequent to the execution of the deed, and in the absence of Snyder, and there being no evidence of concerted design, must be considered as admissions *res inter alios*, and consequently, hearsay, and inadmissible as evidence.

But ought the court to reverse the judgment because of the inadmissibility of this evidence? Were there no other objections to the judgment, the court might well doubt whether they ought to interfere; but on examining the charge of the judge, they are of opinion, that it is not as specific and certain as it ought to have been. The rule in relation to the charge to the jury is, that it be positive and specific, and that nothing be left to inference. From what the judge said in the first part of the charge, the jury may have inferred, that if they believed that Snyder and Pinconneau had no title to the land sold, that the plaintiff had a right to recover; yet from the latter part of the charge, the jury might have an equal right to infer, that the plaintiff had no right to recover, unless Snyder and Pinconneau had deceived the plaintiff as to the nature of their title. The charge then as preserved in the bill of exceptions, does not convey to the jury distinctly, the precise rule that is to govern them in their deliberations. The court are of opinion, that the judge should have instructed the jury, that the defendant was not liable to refund the money paid in this case, unless the defendant, previous to the sale, affirmed what he knew to be false in relation to the title to the land, or concealed some material fact in relation to the title, or used some fraudulent means to induce the plaintiff to accept a deed without covenants of warranty; that a party who takes a quit claim deed on the sale of land, runs the risk of the goodness of the title, unless some fraud has been practised upon him. Inasmuch, then, as the charge may have had an improper influence on the jury, the judgment must be reversed with costs, and the cause remanded to the St. Clair Circuit Court, for further proceedings.

See the cases of *Livingston, et al. v. Maryland Insurance Company*, 7 Cranch, 506; 11 Wheaton, 59, as to the manner of charging a jury.

Separate Opinion by SMITH, J.—I concur in the reversal of the judgment in this cause, on the ground, that it is possible the jury may

have decided against the defendant on the simple ground of a failure of title in Snyder and Pinconneau, without considering it essential that there should have been evidence of fraud against him.

I hold the doctrine correct, that where there is a total failure of title in a case like the present, and no circumstances are adduced to induce the jury to believe that the vendor has acted dishonestly in the sale, but are left to infer that he may have sold under a mistaken impression of his title, that such sale is not *prima facie* evidence of fraud, and that it is necessary, to entitle a party to recover, to show facts sufficient to warrant inferences of fraud. From the general character of the charge, and the fact of the qualification in it (being in the disjunctive), it may have led the jury to the simple inquiry, whether Snyder had title or not, and as none was shown on the trial, they may not have inquired into the question of fraud. That an individual may execute a release for a valuable consideration, for a supposed interest in lands, when in truth he may have no title, either legal or equitable, and not be liable to refund, will depend upon the honesty with which he acts. Should he conceal facts, or misrepresent others necessary to a correct understanding of his title, it cannot be doubted that he would be liable.

In the present case, it does not appear that Snyder was guilty of either a suppression, or a misrepresentation of the manner in which he deduced his title to the lands in question. I had great doubts on the motion for a new trial, whether it ought not to have been granted, but as the evidence of Pinconneau's declarations were not objected to on the trial, and the whole evidence had been weighed by the jury, whose peculiar province it alone was to determine its character and force, I did not feel disposed to disturb the verdict. Upon reflection, I am now satisfied that the confessions of Pinconneau were not evidence, that they must have had great weight with the jury in determining their verdict, that there was no evidence connecting Snyder's acts with those confessions, and when Snyder was not present, and that a possible indistinctness in the charge given, may have had its effect upon the jury to lead them away from the question of fraud in selling the lands in controversy. I believe, for the purposes of justice, that the reversal of the judgment will be but right, all circumstances considered, and therefore concur in the reversal.

Judgment reversed.

Breese and Semple, for appellant.

Blackwell, for appellee.

Allison v. Clark.

ALLISON v. CLARK.

Breese R., 273.

Appeal from Morgan.

1. Upon principles of mutual justice, a vendor ought not to be compelled to part with his title to land until the purchase money has been paid him.
2. The Supreme Court, in an equity cause, will modify a decree according to the facts and justice of the cause.

CLARK exhibited his bill in chancery in the Morgan Circuit Court, at the April term of 1829, against the appellants, to compel the specific performance of a contract to convey a tract of land in the county aforesaid. The bill charges, that the Allison, on the 16th of February, 1826, executed their bond to the complainant, to convey to him a tract of land, upon the condition that the complainant paid them \$207, on or before the last day of February, 1827, the conveyance to be made on the day the money was stipulated to be paid. The complainant in his bill stated, that on the last day of February, 1827, he was ready and willing to pay the purchase money, and that on the 27th of May of that year, he did pay the money to Adam Allison for the defendants, but that the defendants refused to make the conveyance, and sold and conveyed the land to another person, (who was made defendant,) who had notice of the claim. The bill prays for a decree against the defendants for a conveyance to complainant.

The Allison, severally answered the bill, denying the payment of the purchase money, and set up a new and different contract in avoidance thereof, which was evidenced by the note of said Clark to the Allison, executed since the 27th of May, 1827, and which, the Allison contended, was part of the purchase money originally contracted to be paid, but which remained unpaid. The depositions taken by complainant, together with the receipts of the Allison, proved the payment of the notes first executed by Clark to the Allison. The Allison contended that the note subsequently executed by Clark to them, which they produced and proved, was evidence of a new contract yet unperformed on the part of Clark, the complainant. The Circuit Court on a final hearing of the cause, rendered a decree in favor of the complainant for a conveyance of the land, as prayed for in the bill, from which decree the Allison appealed to this court.

SMITH, J.—From a consideration of the facts disclosed by the bill, answers and testimony, in this cause, it is in some degree questionable, whether the decree ought to be disturbed. Taking the whole facts, however, in favor of the appellants, as disclosed, they cannot amount to more than substantiating the belief that the note remain-

Allison v. Clark.

Rolette v. Parker.

ing unpaid, and which, it was contended, was substituted for the original, is still due, and that before the land was to be conveyed, that note, amounting to \$179, was to have been paid on the first of January, 1828. The question of the justice of the decree in the Circuit Court will turn then on the single point, whether that court should have required the payment of that note before it decreed a conveyance of the land in question. The court below must have considered this point of the appellants' answers, as matters in avoidance of the allegations of the bill, and as such requiring proof before it could adopt the conclusion, that this note was substituted for so much of the original consideration. It is really questionable, whether it ought not to be so considered. If it be right so to understand it, the decree ought to stand untouched: but the better construction would seem to be, that this note was given for a part of the original consideration for the lands; and that upon its payment, the lands were to be conveyed to Clark. The principles of natural justice would seem to require that the appellants ought not to part with their title to the land until they had received the amount for which they had contracted, and that equally so, the appellee ought not to receive a title until he had paid for the same the amount agreed on. The transaction between the parties is by no means free from obscurity and doubt. Upon the whole, it is the opinion of the court, that equal justice to the parties requires a modification of the decree, so that each shall obtain his rights. The decree is to be modified in this court, so as to require the complainant in the bill to pay the note of \$179, with the interest due thereon to this time, and upon which, the defendants in equity are to convey the lands in the manner stated in the decree of the Circuit Court, and the costs in this court, and in the court below, are to be divided between the parties, each paying in those courts, his own costs.

*Decree modified.**Thomas*, for appellants.*McConnel*, for appellee.

 ROLETTE v. PARKER.

Breese R., 275.

Appeal from Jo Daviess.

WHERE a tenant in common sues for the conversion of a chattel by a stranger, he can only recover for his undivided interest.

*Judgment reversed.**Ford*, for appellant.*J. B. Thomas*, for appellee.

Johnson v. People.

Bennett v. Schermer.

Doe & Herbert.

JOHNSON v. PEOPLE.

Breese R., 276.

Error to Madison.

WHERE a law imposes a fine of ten dollars, upon conviction of an offender, it is error to fine him twelve dollars.

SMITH, J, dissented.

*Conviction reversed.**Semple*, for plaintiff.*Cowles*, for defendant.

BENNETT v. SCHERMER.

Breese R., 277.

Appeal from Jo Daviess.

WHERE a record is so imperfect that the Supreme Court cannot say that the facts warranted the judgment below, a *venire de novo* will be awarded.

*Judgment reversed and remanded.**Cavalry* and *Semple*, for appellants.*Ford*, for appellees.

DOE v. HERBERT.

Breese R., 279.

Agreed case from Randolph.

1. Possession alone, in the absence of a higher grade of title, is evidence of title in fee.
2. A *prior* possession, under a *claim of right*, will prevail over a *subsequent naked possessory claim*.
3. The action of ejectment is in reality an action of trespass, superadding thereto an execution whereby the prevailing party obtains the possession of the land itself.
4. The plaintiff, in ejectment, must prove property in himself, and a right to possession, or a simple right to the possession.
5. He is not compelled to establish title, but may rely upon a simple right of possession and conceal his real title.
6. The plaintiff in ejectment must recover upon the strength of his own title, and not upon the insufficiency of the right of his adversary.
7. Where title is divested by operation of law, the possession of one claiming against the law, but who was in possession at the time the law commenced operating upon the right, is not adverse to the title of him who claims under the law.
8. A grantor who has no interest in the suit, and is not bound by any covenant, is a competent witness.
9. A deed, to be valid, must be delivered and accepted; a simple record of the deed is evidence of neither fact when opposed by the general facts of a case.

THE record presented the following state of facts. Ninian Edwards

had peaceable possession of the premises in question in 1810, and continued it until the sale to Thomas F. Herbert by deed duly executed and recorded, bearing date the 7th day of September, 1818, which was produced and read in evidence. T. F. Herbert, immediately upon the purchase, went into peaceable possession under his deed from Edwards, and remained in possession until his death, which happened in 1821. The plaintiffs also produced in evidence, a deed regularly executed and recorded, from Charles Slade, administrator of said T. F. Herbert, bearing date the 23d day of July, 1823, conveying to the lessees of the plaintiff the premises in question, to whom he had sold the same under the authority of, and in compliance with an act of the general assembly of the State of Illinois, entitled, "An act authorizing the administrator of Thomas F. Herbert, deceased, to sell certain lands," approved Dec. 19, 1822. The plaintiff also proved that Charles Louviere was in possession of the premises at the time of the service of the declaration and notice, and here the plaintiffs rested their case. The defendant then moved the court for a nonsuit, on the ground that the plaintiffs had not produced sufficient evidence of title to put the defendant on his defence, which motion the court overruled. The defendant then produced in evidence the record of a deed from T. F. Herbert to John C. Herbert, bearing date the 29th of September, 1818, for the premises in question, which deed was not attested, by any subscribing witness, but was acknowledged before a justice of the peace for Randolph county, within which county the premises are situate, and recorded in the recorder's office for said county, on the 15th day of January, 1819. This deed was objected to by the plaintiffs, on the ground that it was not executed in conformity with law, having no subscribing witness, and on the further ground, that it had not been delivered by the grantor, and accepted by the grantee; and to sustain this latter objection, the plaintiffs proved, by Charles Slade, the administrator aforesaid (whose testimony was objected to by the defendant on the ground that he was the grantor, as administrator, in the deed under which the plaintiff claimed, but who deposed that he had no interest in the event of the suit, and his deed to plaintiffs contained no covenants), that he had found the deed from Thomas F. Herbert to John C. Herbert, among the papers of the said Thomas, after his death. The original deed from T. F. Herbert to J. C. Herbert was not produced, nor was it proved that it was ever in the possession of J. C. Herbert, nor was it proved where the same was. The defendant then proved that T. F. Herbert was indebted to the said J. C. Herbert in the sum of \$1,200, and that at the time of the execution of said deed, he had incurred

further responsibilities for the said T. F. Herbert as his security, amounting to more than \$3,000, that they were brothers, and that C. Slade, the administrator of T. F. Herbert, permitted the said J. C. Herbert, by his agent, to take possession of the premises and receive the rents, who had continued the possession ever since.

Upon this state of facts the Circuit Court gave judgment for the lessors of the plaintiff, which, by consent, was subject to the opinion of the Supreme Court.

SMITH, J.—Under the agreed case, upon which this cause has been presented to this court, four questions are to be considered.

1. Was the motion in the court below for a nonsuit properly overruled?

2. Was the execution of the deed of Slade, as administrator of Herbert, valid; and did the title to the lands in question pass thereby?

3. Was the grantor, Slade, a competent witness on trial?

4. Was there a due execution and delivery of the deed, by Thomas F. Herbert, to John C. Herbert?

The action of ejectment is considered in reality as an action of trespass adding thereto an execution by which the prevailing party obtains the possession of the thing itself. The plaintiff must prove property in himself, or a right of possession—he may try the title or not, and if he does not desire to adduce his title, he may try nothing but the right of possession. Prior possession is evidence of a fee, and, although the lowest, unless rebutted by higher, it must clearly prevail. It is equally well settled, that the lessor of the plaintiff must recover on the strength of his own title. Let these principles be applied to the case before us, and inquire upon what evidence the court below overruled the motion for a nonsuit. It appears from the case, that it was proven that N. Edwards, through whom the title in question is asserted, had peaceable possession of the premises as early as 1810, and continued it, without any chasm, until the sale to Thomas F. Herbert, on the 7th of September, 1818, that Herbert immediately upon the purchase went into peaceable possession, and died in possession in 1821. A deed regularly executed by Charles Slade, the administrator of Thomas F. Herbert of the date of the 23d May 1823, conveying to the lessors of the plaintiff the land in question which had been duly recorded, was produced, and to whom he had sold the same under the authority of, and in compliance with, a law of this State approved 19th December, 1822. The plaintiff also proved that Charles Louviere, the tenant, was in possession at the time of the service of the declaration, and here rested his case.

The Supreme Court of the State of New York have said, that *title may be inferred from ten years' possession*, sufficient to put the defendant on his defence, *Smith ex dem. Teller v. Burtis and Woodward*, 9 Johns. Rep. 197; and that a prior possession, short of twenty years, under a claim of right, will prevail over a subsequent possession of less than 20 years, when no other evidence of title appears on either side. There are several decisions of that court which sustain this doctrine, *Smith v. Lorillard*, 10 Johns. Rep., 355; *Jackson v. Myers*, 3 do., 388. **Jackson v. Harder*, 4 do., 202.

The proof here adduced was *prima facie* evidence both of title, and of right of possession, and was sufficient to put the defendant on his defence. It was not necessary that the plaintiff should have shown a possession of twenty years, or a paper title. His possession, as proved, was presumptive evidence of a fee, and was conclusive on the defendant, until he showed a better title. Upon this state of the case, the mere naked possession of the defendant could not prevail against it. There can, then, be no doubt, that the motion for a nonsuit was properly overruled. The next point to be considered, is, the validity of the deed of the administrator executed by virtue of a law of this State, and the effect thereof.

T. F. Herbert having died in 1821, between that time and the making of the deed by the administrator in 1823, by consent of the administrator, John C. Herbert, by his agent, took possession of the premises in question, and continued up to the present time. It is then contended, that the administrator being out of the possession of the lands, at the time of making the conveyance, that it is therefore void. Upon the death of Herbert, the estate in the premises passed to his heirs, and the legislature having by a law authorized the sale of the premises by the administrator, we think it not important to inquire whether the administrator was in, or out, of the actual possession of the land, at the time of making the conveyance by him. It may be doubted, whether the possession of Herbert was such an adverse possession as would have rendered a conveyance by the heirs, void; but the law of the legislature must be considered as a paramount authority, and it being admitted that the conveyance has been made agreeably to the provisions of that law, the estate of which Herbert died seized, passed by that deed, and it was well executed, and not void because of the possession of the agent of John C. Herbert. Where the title is divested by the operation of law, as in sales under execution, the possession cannot be considered such an adverse possession as to defeat the deed and render it inoperative. *Jackson v. Bush*, 10 Johns. Rep., 223. The inquiry as to the competency of Slade, the administrator and

grantor of the deed to the lessor of the plaintiff, will be now considered.

It is apparent that Slade had no interest in the decision of the cause: he had entered into no covenants upon which he could be liable; upon general principles, then, he was a competent witness, and the rule, that all persons not affected by crime or interest, are competent witnesses, must prevail. This is not a question of the admissibility of the maker of an instrument to impeach it, or destroy it for want of a consideration, or for fraud. Though even in such a case, the grantors in a deed have been admitted in an action of ejectment in the Supreme Court of Massachusetts—that court deciding, that the exception made, applies alone to negotiable instruments, which, upon principles of public policy and morality, ought not to be suffered to be impeached. *Loper v. Haynes*, 11 Mass. Rep., 498.

In the present instance, Slade was not offered to prove any fact in connection with the execution of his deed as administrator, but collateral facts affecting the deed from Thomas F. Herbert to John C. Herbert. His admissibility, then, depended entirely upon his interest in the event of the suit, and standing indifferent in that respect, he was properly admitted to testify.

The last and remaining question, and most important one in the case, is, whether there was a *delivery* of the deed from T. F. Herbert to John C. Herbert. The objection to it, is, that it was never delivered by the grantor to the grantee, nor to any other person for his use, nor was there any acceptance by the grantee. The facts disclosed in relation to this deed, are, that it was found among the papers of Thomas F. Herbert, after his death, by Slade, his administrator; that the deed had never been in possession of the grantee, the administrator having, after its discovery, delivered it to a third person, and that the administrator did not know where it was. The original deed was not produced in evidence, nor its absence accounted for; but the records of the county, which showed that the deed had no subscribing witness, was acknowledged before a justice of the peace, bore date on the 29th of September, 1818, and was recorded on the 15th of January, 1819. The defendant proved, that Thomas F. Herbert was, in 1812, indebted unto the grantee John C. Herbert, in the sum of \$1,200, and that he had been compelled to pay as security for Thomas F. Herbert, more than \$3,000 since that time.

From this state of facts, it is to be determined whether there was a delivery and acceptance of the deed to John C. Herbert.

It is most manifest that there could have been no delivery of the

Doe v. Herbert.

deed to the grantee, so as to pass the estate. The act of recording a deed, cannot amount to a delivery, when there does not appear an assent, or knowledge by the grantee, of the act. In this case, there is not a scintilla of evidence calculated to lead the mind to the belief, that the grantee ever knew of the deed until after the death of the grantor. There could then have been no acceptance by the grantee, because the possession of the deed, if such had been the fact, derived after the death of the grantor, could not amount to one, there having been no delivery during the life of the grantor. That it is essential to the validity of a well-executed deed, that there should be a delivery, will not be controverted. This delivery is said to be, "either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be both; but by one or both of these, it must be made, for otherwise, though it be never so well sealed and written, yet is the deed of no force.

"It may be delivered to the party himself to whom it is made, or to any other person by sufficient authority from him, or it may be delivered to a stranger for, and in behalf, and to the use of him for whom it is made without authority, but if it be delivered to a stranger without any such declaration, unless it be delivered as an *escrow*, it seems that it is not a sufficient delivery." *Jackson v. Phipps*, 12 Johns. Rep., 419; 1 Shep. Touch., 57, 58; 2 Black. Com., 307; *Viner's Abr.*, 27, § 52.

It is also held to be essential to the legal operation of the deed that the grantee assents to receive, and that there can be no delivery without an acceptance. Indeed, a delivery of a deed which is essential to its existence and operation, necessarily imports that there should be a recipient. Now in this case, it would be idle to contend that there was a delivery and reception, when the grantor died before the grantee knew of the existence of the deed; he could not then receive that, of the existence of which he had no knowledge, nor could there have been a delivery to him without such acceptance. There had been no act on the part of the grantor before his death, tantamount to a delivery, much less an actual one. The act of recording does not amount to it, because there appears a total absence of knowledge on the part of the grantee, of such recording, or even of the existence of the deed until after the death of the grantor, and it does not appear that he had ever received the deed. The cases of *Jackson v. Phipps*, 12 Johns. Rep., 419, before referred to, and *Maynard v. Maynard* and others, 10th Mass. Rep., 457, are directly in point, and sustain the principles here laid down. Without then inquiring whether the deed was fraudu-

Doe v. Herbert.

Lattin v. Smith.

Connolly v. Cottle.

lent, it is sufficient to ascertain that the deed was never well executed by delivery, and that no estate passed thereby. The judgment is therefore affirmed with costs.

Judgment affirmed.

Breese, for plaintiff.

Kane and *Baker*, for defendants.

LATTIN v. SMITH.

Breese R., 284.

Error to Jo Davies.

1. A *ca. sa.* is not void because it does not recite that it was based upon the oath of the plaintiff.

2. A declaration for an escape need not aver that the plaintiff made the oath required by law prior to the issuing of the *ca. sa.*

3. An officer is bound to obey the mandate of a writ, and he acts at his peril as to its legality; but if he proceeds to execute an illegal writ, he is bound to complete its execution, and cannot excuse himself by showing that it was irregular or void.

4. If a justice has jurisdiction, the officer who executes his process is not bound to inquire into the regularity of the proceeding in order to justify his conduct under the writ.

Judgment affirmed.

Ford, for plaintiff.

Cowles, for defendant.

CONNOLLY v. COTTLE.

Breese R., 286.

Appeal from Jo Davies.

1. WHERE a note, upon its face, shows that it was given to secure a debt due by a stranger, and no consideration is expressed therein as the basis of the promise, the plaintiff must aver a consideration.

2. A variance as to the promise of a note, between the declaration and evidence, is fatal.

3. *Quære.* Is there a difference between the British and Illinois statutes of frauds, and how shall the words "*promise*" and "*agreement*," used in each, be construed?

Judgment reversed.

Semple, for appellant.

Strode and *Ford*, for appellee.

Brinkley v. Going.

Brinkley v. Going.

Garner v. Willis.

BRINKLEY v. GOING.

Breese R., 288.

Appeal from Gallatin.

1. POSSESSION of a note by the payee is *prima facie* evidence of title.

2. An indorsement of a note is within the legitimate control of the holder.

3. If a payee has indorsed a note, and yet brings suit upon it, describing himself as assignee, and also as payee, the declaration is good; the former allegation may be rejected as *surplusage*.

*Judgment affirmed.**Eddy*, for appellants.*Gatewood*, for appellee.

BRINKLEY v. GOING.

Breese R., 289.

Appeal from Gallatin.

THE payee and holder of a note, with an assignment thereon to a stranger, may, without a re-assignment, maintain an action thereon.

*Judgment affirmed.**Eddy*, for appellant.*Gatewood*, for appellee.

GARNER v. WILLIS.

Breese R., 290.

Error to Gallatin.

1. THE oldest execution delivered to an officer, though issued upon a junior judgment, binds the personalty of the debtor.

2. An execution returned "*not levied*," is *functus officio*.

3. A delivery is essential to the validity of a constable's sale of goods and chattels.

*Judgment reversed.**Gatewood*, for plaintiff.*Eddy*, for defendant.

Simms v. Klein.

Blue v. Weir.

Woodworth v. Paine.

SIMMS v. KLEIN.

Breese R., 292.

Appeal from Morgan.

1. A SHERIFF's return to a process of summons in these words, "J. R. Simms summoned by reading, August 17th, 1830," and signed by the sheriff, is a legal service.

2. A judgment need not specify the costs *in numero*.

3. Appeal taken for delay—10 per cent. damages awarded.

*Judgment affirmed.**McConnel*, for appellant.*Thomas*, for appellee.

BLUE v. WEIR.

Breese R., 293.

Error to Gallatin.

A JUSTICE has no jurisdiction of a demand for more than \$100—though reduced below that sum by fair credits.

*Judgment affirmed.**Webb*, for plaintiff.*Eddy*, for defendant.

WOODWORTH v. PAINE.

Breese R., 294.

Error to Randolph.

1. OBSOLETE statute. Judgment *v.* intestate entitled to priority of payment.

2. Statute treating of inferior things, does not apply to those of superior dignity.

3. A statute will ordinarily be construed as prospective in its operation.

*Judgment reversed.**Breese and Baker*, for plaintiff.*Hall* for defendant.

Teague v. Wells.

Prince v. Lamb.

Buckmaster v. Eddy.

TEAGUE v. WELLS.

Breese R., 297.

Error to Madison.

1. A DEFENDANT who appeals from the judgment of a justice of the peace, cannot rule the plaintiff to give security for costs.

2. The statute applies to *voluntary* suitors.

*Judgment reversed.**Semple*, for plaintiff.*D. Blackwell*, for defendant.

PRINCE v. LAMB.

Breese R., 298.

Error to Gallatin.

1. A VARIANCE between the writ and declaration can only be reached by plea in abatement.

2. In order to recover interest in an action upon a foreign judgment, the declaration need not specifically claim it, nor show the foreign law as the basis of the claim.

3. A judgment in debt, upon a judgment for the debt, naming the sum, and for "*interest on the amount*" is erroneous.

4. The Supreme Court will not remand a cause, where a technical error exists in the record, if they can ascertain from the transcript what judgment ought to have been rendered.

*Judgment modified.**Eddy*, for plaintiff.*Thomas and Rowan*, for defendant.

BUCKMASTER v. EDDY.

Breese R., 300.

Error to Gallatin.

1. A BOND for the conveyance of lands is not assignable at common law, nor under the statute of 1807, so as to enable the assignee to sue at law in his own name.

2. The word "*property*" defined.

*Judgment reversed.**Gatewood and Semple*, for plaintiff.*Eddy* for defendant.

Pankey v. Mitchell.

Beaird v. Foreman.

PANKEY v. MITCHELL.

Breese R., 301.

Error to Gallatin.

THE alteration of a note, in a material fact, without the knowledge or consent of the maker, by the payee—renders it void.

*Judgment reversed.**Gatewood*, for plaintiff.*Eddy*, for defendant.

BEAIRD v. FOREMAN.

Breese R., 303.

Appeal from St. Clair.

1. Where an officer, in the execution of process, acts oppressively or illegally, the remedy of the injured party is at law, and not in a court of equity.
2. A defendant in execution, if he desires a levy upon a particular tract of land, must exhibit his title to the sheriff or coroner.
3. Where, on a bill to restrain a sheriff or coroner from selling personal property under an execution, the plaintiff, who had nothing to do with the levy, need not answer the bill, a decree may be entered without reference to him.
4. A court of equity will not ordinarily declare an execution, valid upon its face, void for extrinsic causes.

THE defendant, together with *Jonathan Lynch*, *Mary Ann Chart-rand*, *John Norton* and *Thomas Baldwin*, who were judgment creditors of the appellant, issued executions upon their several judgments against the appellant, who was then sheriff of St. Clair county, and placed them in the hands of Pulliam, the coroner of that county, to be executed. Pulliam, by direction of the defendants, levied said executions upon the personal property of Beaird, but before the sale, Beaird obtained an injunction from the judge of the fifth judicial circuit, to stay all proceedings on said executions, setting forth in his bill, that he had real estate unencumbered, in Madison, St. Clair and Randolph counties, which ought to be first taken in execution and sold, before resort could be had to his personal property, and relied on the proviso in the 9th section of the "act concerning judgments and executions" approved Jan. 17, 1825, which declares, "that the plaintiff in any execution, may elect on what property he will have the same levied, except the land on which the defendant resides, and his personal property, which shall be last taken in execution." Pulliam, the coroner, alone answered the bill, denying that Beaird had any title to the lands specified by him as lying in St. Clair county, except his homestead, and that they were mortgaged, prior to the judgments on which these executions issued, to the State Bank,

and alleging that Beaird never surrendered to him the lands in Madison and Randolph or the title papers to the same, to satisfy said executions, and that all his lands lying in St. Clair county, except his homestead, had been previously sold on executions against him. On filing this answer, the defendants moved to dissolve the injunction and dismiss the bill. The court dissolved the injunction, but refused to dismiss the bill, and thereupon, by consent, the bill was dismissed and an appeal taken by Beaird to the Supreme Court. The Circuit Court awarded damages in favor of the appellees, though some of them were not served with process, had not appeared or answered. some exceptions were also taken to the validity of the executions in virtue of which the levy complained of was made.

SMITH, J.—The points presented for the consideration of this court in the present case are, that the Circuit Court erred in dissolving the injunction.

1. Because a part of the defendants were never served with process, and another portion never answered, and

2. Because the executions were not shown to the defendant in the court below, and that the same are void, and conferred no authority to the coroner to proceed under them.

To understand these objections fully, it may be necessary to recapitulate the objects of the bill.

The complainant sought to enjoin perpetually, all the defendants to the bill, who were several judgment creditors, except the coroner, in their separate and individual capacities, from proceeding to collect their several judgments by execution, because he alleges that under the laws of this State, the property so taken in execution by the coroner was not liable to be sold, being personal property. The authority of the coroner is not disputed as such coroner, but that the appellant having real estate sufficient to satisfy the executions in his hands, it was the duty of the coroner to have levied on that, and sold it first, before he could resort to the personal estate. This ground was assumed in the argument, though it will be perceived it is not assigned as one of the causes of error, nor could it have been sustainable, when it is remembered, that, if there had been any oppressive or illegal act of the coroner in the levy on the property, the Circuit Court possessed sufficient power to stay the proceedings under the execution and remedy the evil if one had existed. That this power is a necessary incident to all courts to prevent abuses of process, will not be denied, and that it is the proper mode to which to resort, rather than a court of equity, seems equally certain. The

complainant having then a full and perfect remedy at law, the bill could not properly be sustainable for that reason.

But on examining the answer of the coroner, it is clearly shown, that all the real estate in St. Clair county of the complainant, except the tract on which he resided, had been sold previously by the coroner upon other executions, or was subject to incumbrance by mortgage, and that the complainant neither offered the lands on which he resided, nor did he exhibit his title deeds, or manifest any desire to deliver any estate whatever, either real or personal, to be sold in satisfaction of the executions, previous to the levy made by the coroner on his personal estate. Without then deciding whether the defendant in a judgment, or the plaintiff, has the right of selecting the *personal property*, or the *lands* upon which the defendant resides under an execution issued under such judgment, it will be apparent that the complainant has not shown, that at any time before the levy upon his personal estate, or even at that time, did he offer his real estate to be sold upon the executions of the defendants.

It will surely not be contended that an officer is bound to take any loose memorandum which a defendant may offer as evidence of his title to lands, and thereupon expose the same for sale. Every reasonable evidence of title should be exhibited, and the officer satisfied that he was not proceeding to expose to sale the property of another person before the exemption could be claimed for the personal estate, if that exemption be allowed by law, but which is not now decided, because the complainant has not shown himself entitled thereto, even if the statute be so construed. There is then no ground of equity disclosed, by which the complainant should be entitled to relief on this part of the case.

The error relied on in the first point is readily met, when it is seen that the coroner could alone answer to the allegations of the bill as to the manner of the levy, and the property taken, which is the sole ground relied on for the equitable interposition of the court. The judgment creditors were entire strangers to the acts of the coroner, could not in any way be supposed to have participated therein; and if called on to answer as to that part of the bill, could only have avowed that the coroner had done what he distinctly states he has done. Their answer or appearance would then have been wholly unimportant for the decision of the question before the court on the motion to dissolve the injunction, and for that reason the objection fails entirely as a ground of error. The coroner's answer to the main allegations of the bill, relied on for relief, fully meets those allegations, negating some of the most important ones, and particularly

as to the time when the levy was made. The second ground, that of not showing the executions and the mode of levying them, are already anticipated by the remarks on the power of the court below on motion, to have remedied all irregularity, if any existed; and, indeed, if the process of execution was void, or used oppressively for malicious purposes, the officer would no doubt be liable for whatever injury might be sustained.

If, however, the executions were void, and conferred no authority to the coroner to proceed under them, it is certain that all the parties concerned would be answerable as trespassers. But it is not by any means certain that this court would proceed to adjudge executions apparently regular upon their face, void, at least until an effort had been made in the tribunal from which they issued, for relief, in conformity to the views herein already expressed on that point. No attempt has been made to the law side of the Circuit Court to set aside or quash those executions as having been irregularly issued, or as being void on their face, and it will not be denied if either exist, that relief at law, by making such application, also exists.

The bill having been dismissed by the consent of parties, after the dissolution of the injunction, no question is now made whether the dissolving an injunction is a mere interlocutory order from which no appeal or writ of error lies.

Upon a full view of all the grounds presented in this case, it is the opinion of the court that there are no sufficient equitable grounds of relief disclosed by the complainant to entitle him to the interposition of a court of equity, and* that the Circuit Court did not err in dissolving the injunction and dismissing the bill. The judgment of the Circuit Court is therefore affirmed with costs.

Judgment affirmed.

McRoberts, for appellant.

Blackwell, for appellees.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1831.

PRESENT :

WILLIAM WILSON, CHIEF JUSTICE.	
THOMAS C. BROWNE,	}
SAMUEL D. LOCKWOOD,	
THEOPHILUS W. SMITH,	
	ASSOCIATE JUSTICES.

SEMPLE *v.* LOCKE.

Breese App., 5.

Appeal from St. Clair.

A JUDGMENT by default is erroneous, where a plea is on file.

Judgment reversed.

Prickett and *Semple*, for defendant.

Cowles, for appellee.

KERR *v.* WHITESIDE.

Breese App., 6.

Error to Madison.

1. *Quære.* Can a judgment by default be set aside after the term?
2. *Quære.* Can a sheriff's return be contradicted?
3. When the appellate court is divided in opinion, the judgment will be *affirmed*.

Judgment affirmed.

Auditor of State v. Hall.

Littleton v. Moses.

Betts v. Menard.

AUDITOR OF STATE v. HALL.

Breese App., 8.

Original Proceeding.

A NOTICE against a delinquent treasurer of state, must be specific.

Motion dismissed.

LITTLETON v. MOSES.

Breese App., 9.

Appeal from Union.

1. A JUDGMENT will not be reversed where the inferior court *substantially* give instructions as asked.

2. The refusal of the inferior court to grant a new trial cannot be assigned for error.

*Judgment affirmed.**Breese*, for appellant.*Baker*, for appellee.

BETTS v. MENARD.

Breese App., 10.

Appeal from Randolph.

1. A ferry privilege is a franchise, and more—it is a monopoly—it cannot be created by implication.
2. The county commissioners have no implied power.
3. A statute authorizing the county commissioners to grant ferry franchises to "*persons*" does not include the power to grant such franchises to a corporation.
4. A municipal corporation has no power to accept a ferry franchise, if granted by the county commissioners.
5. The County Commissioner's Court is a court of record, but is a mere creature of the constitution and the laws, and can exercise no powers by implication; its jurisdiction is limited as to the subject matter, and the mode and manner of exercising it.

SMITH, J.—Several points have been presented by the counsel for the appellant, upon which it is contended that the judgment of the Circuit Court ought to be reversed.

It will, however, be unnecessary to examine but one question presented by the record and bill of exceptions, and upon which this case must entirely depend.

The appellant justified the keeping up and maintaining his ferry in the action in the Circuit Court, under the license granted by the County Court to the trustees of the town of Kaskaskia as a body corporate, as their agent constituted in writing. The date of the

license granted to the trustees, is the 15th of August, 1830, and that of the agency, the 30th of the same month. It appears that the appellant actually conducted the ferry, and transported the passengers, on the times, and in the manner and number as alleged by the plaintiff, and it is conceded that the amount of the judgment is not the point in controversy, but the right to maintain and exercise the ferry privileges as granted to the corporation.

The accuracy then of this decision necessarily involves the question, whether the County Court possessed the power to grant a license to a corporate body to exercise ferry privileges? and if so, whether the corporation could legally accept a right thus offered to be conferred?

The County Commissioners' Court is the mere creature of the statute, which gave to it all the powers which it exercises; and although it is directed to be created by the constitution of the State, as a court, still its whole powers and duties are also directed by that instrument to be, and in fact are, defined by law. The fourth section of the act defining its duties, and declaratory of its powers, restricts their exercise within the county, enumerating among other special powers, the right to grant licenses for the erection of ferries, leaving it, doubtless, to the exercise of its legal discretion, to determine in what cases it should be done, 'as restricted by various legislative acts.

It will not then be doubted, that although it is a court of record, still its jurisdiction is special and limited in its character: and from the various anomalous duties, it is, by law, required to perform, it will be seen that those duties and powers are, in some instances, ministerial, and in others judicial. The several acts relative to the powers and duties of the County Commissioners' Courts, which have been passed at various times by the legislature of the State, have invariably defined the manner of making the application for such license, and also prescribed the mode of *granting*, and *to whom*, and upon what conditions.

Those acts and particularly the act of the 17th February, 1827, Rev. Laws, 1827, p. 220, being the one under which the license to the trustees was granted, speaks of "persons" only, and this act, in the first section, speaks of granting licenses to "qualified persons," and has so restricted the granting to such persons. The proviso to this section reserves the right of preference, however, to the proprietors of the lands adjoining to, or embracing the water course, over which the ferry is proposed to be erected.

The second section requires, when such license shall be granted, the party receiving the grant shall give bond and security to be approved by the court, in a sum not less than \$100, nor more than \$500, pay-

able to the county commissioners of the county, conditioned, that "*he she, or they,*" will keep such ferry according to law. The third and fifth sections provide how such ferries shall be kept, and imposes certain duties on their owners, particularly as to the expediting the passage of public messengers, and expresses, and inflicts penalties and fines for a non-observance of such requisitions.

The ninth section declares such privileges shall be exclusive, and the twelfth section gives certain privileges to ferry-keepers, and exemption from the performance of militia, jury, and other duties, in consideration of giving free passage to public messengers and others. It cannot then be doubted, that the Legislature never intended to authorize the County Commissioners' Court to grant licenses to keep ferries to any other than natural persons. It is impossible to draw, from the whole context of this act, or any other existing law on the same subject, in connection with the whole, or any of the several parts thereof, the inference that a grant could be authorized to be made of a ferry license to a corporation.

It will not, we apprehend, be denied, that in the enactment of legislative bodies, where persons are spoken of, any other than natural persons are intended, unless it be absolutely necessary to give effect to some powers already conferred on artificial persons, and which it is necessary should be exercised by them, to carry into effect the objects contemplated in their grant or charter. In the present case, however, the requisition of the bond, security, and other acts required to be done, and penalties imposed for the non-observance of the provisions of the law, are such that they could scarcely be complied with by a corporation, and not in any way by the trustees in the present case, and evince most conclusively, that not even by implication, can it be contended, such a body could have been intended, as entitled to require the granting of a license to carry on a public ferry. Hartford Fire Insurance Company, 3 Conn. Rep., 15. It is also impossible to conceive the idea, that if the County Court had the general powers to determine in what instances they might issue a license, and to whom, and that such an act was legally done, that the trustees in this case were, in any way capable of taking the grant.

The act of incorporation, creating the trustees a body politic, nowhere confers the least semblance of such a power, much less an authority to delegate the right to others. The right to take such a grant is entirely beyond the sphere of their action, which relates to other duties connected with the town. The corporation is a public body for certain defined and specified objects, and must act *within*, and cannot legally, in any instance, *transcend* its limits. Its orbit is

Betts v. Menard.

Hargrave v. Penrod.

defined, and in its action it cannot revolve beyond it. It cannot compromit its members by engaging in an act wholly unauthorized, and never in any way contemplated in its charter. To do that would be to expose the inhabitants of the town to possible onerous burdens, expenses and losses which might most seriously affect them. A corporate body can act only in the manner prescribed by the act of incorporation which gives it existence. It is the mere creature of the law, and derives all its powers from the act of incorporation, and is incapable of exerting its faculties only in the manner that act authorizes. 2 Cranch, 127, 167.

The exclusive privilege of a ferry is a monopoly, and can it be seriously contended, that monopolies may be conferred by implied powers, and received in a case where no right whatever is given to take, to the direct injury of another, on whom the law has already conferred the exclusive right.

It is too obvious to doubt, that the County Commissioners' Court had no direct, or even implied power to make the grant in question, and it is equally certain that the trustees of the town had not the least power conferred on them by their act of incorporation, to accept it. The license, we are satisfied, was absolutely void, as granted without authority, and consequently, the justification set up under a void license, necessarily fails.

The judgment of the Circuit Court is therefore affirmed; and the appellee must recover his costs in this court, and in the court below.

Judgment affirmed.

Breese and Baker, for appellant.

Hall, for appellee.



HARGRAVE v. PENROD.

Breese App., 15.

Appeal from Union.

1. Case lies against a sheriff for gross negligence in executing or failing to execute a writ of *feri facias* whereby the plaintiff is damaged.
2. The sheriff, in such cases, acts at his peril, and cannot excuse himself for a return of *nulla bona* by his ignorance of the existence of goods and chattels belonging to the defendant in execution, nor because the plaintiff did not point them out.
3. If the sheriff returns *nulla bona*, when he might have levied the money, and upon the faith of this return the plaintiff sues out a *ca. sa.* against the body of the defendant in execution, upon which the latter is arrested, and afterward, by the act of the plaintiff, is discharged from imprisonment, the *ca. sa.* arrest and discharge is no bar to the action against the sheriff for his prior neglect of duty under the writ of *feri facias*.
4. Where judgment sounds in damages, and the execution is in *debt*, the execution may be amended upon the trial in a collateral action.

5. A fee bill is assimilated to an execution; and if not executed within ninety days from its date, is *functus officio*.
6. The omission of an *ad damnum* in a declaration is cured by a verdict and judgment thereon.

THIS is an appeal from a judgment rendered in the Union Circuit Court, in favor of the appellee, and against the appellant, who sued the appellant in an action on the case. The damages were laid in the summons at \$300. There were two counts in the declaration, both of which are substantially the same; in each of which, the appellee complained, that on the 20th day of April, 1830, he recovered a judgment in the Union Circuit Court in his favor, against one William Lamar, for \$147 6¼ damages and costs, upon which judgment, on the 12th day of May in the same year, he sued out his *fiery facias* for the obtaining satisfaction of said judgment, which writ was directed and delivered to the appellant as sheriff of Union county, to be executed; and, that being such sheriff, and while he had the writ in his hands, Lamar had goods and chattels of which the money might have been made; of which goods, etc., the first count alleges, the appellant had notice, but the second count does not; and that appellant neglected to levy the execution on those goods, etc., whereby the appellee was deprived of the means of collecting his judgment, to his great damage, but no sum is named as the amount of the damage. To this declaration, the appellant pleaded, beside the general issue, the following special pleas, to wit: And for further plea in this behalf, the said defendant says *actio non*, because he says that he did levy on and sell, by virtue of said execution and for the satisfaction of the same, all the goods and chattels, etc., belonging to the said Lamar, and which were known and notified to the said defendant, all which, etc.

And for further plea in this behalf, the said defendant says, plaintiff aforesaid *actio non*, because he says that after the return, by this defendant, into the office of the clerk of the Circuit Court, of the said writ of execution mentioned, and before the commencement of this suit, he the said plaintiff caused to be issued and put into the hands of this defendant as sheriff as aforesaid, a certain other writ of execution in his said plaintiff's favor, against the said William on said judgment, which writ is commonly called a writ of *capias ad satisfaciendum*, on which said writ, he, said Lamar, was arrested by his body and taken into the custody of this defendant; and after being and remaining in such custody for a long time, was by the said plaintiff discharged from custody and permitted to go at large; and this he is ready to verify, etc., wherefore, etc. To these pleas the plaintiff demurred generally, which the court sustained. The issue on the

plea of not guilty was tried, and a verdict rendered for the appellee for \$155 $\frac{5}{8}$ for which the court rendered judgment.

On the trial, the plaintiff after reading to the jury the record of a judgment in the Union Circuit Court for \$147 $6\frac{1}{4}$ damages, and \$21 $6\frac{1}{4}$ costs, offered in evidence an execution for \$147 $06\frac{1}{4}$ *debt*, and \$21 $6\frac{1}{4}$ costs, to the reading of which to the jury, the defendant objected; whereupon the plaintiff moved the court for leave to amend said execution, by erasing the word *debt*, and inserting the word *damages*; which amendment the court permitted, and then admitted the execution in evidence, to which the defendant excepted. The defendant then offered in evidence, a certain fee-bill put in his hands as sheriff for collection, against Lamar, and in his hands at the same time the execution in the declaration mentioned was in his hands, which fee-bill, and the return thereon showed, that the defendant had levied it upon a certain horse belonging to Lamar, and sold the horse and applied the proceeds in satisfaction of the fee-bill. The levy on the horse was made after ninety days from the date of the fee-bill, as the defendant acknowledged before the court and jury. To the reading of this fee-bill in evidence, the plaintiff objected, because it was levied after the ninety days, which objection was sustained by the court—to which opinion of the court the defendant also excepted, and appealed to this court.

SMITH, J.—The appellant relies on the following points for a reversal of the judgment of the court below:

First. The error, as alleged, in sustaining the demurrer to the second and third pleas of the defendant in the court below.

Second. The variance between the execution given in evidence on the trial and the one described in the declaration, and suffering the same to be amended and given in evidence to the jury.

Third. That the fee-bill offered in evidence ought not to have been rejected.

Fourth. The omission of damages in the conclusion of the declaration of the plaintiff.

There is little difficulty in deciding on the questions arising under the demurrer. An essential ingredient is wanting in the first plea to constitute it a good one. In no part of it does the defendant aver that he used any exertion or diligence to ascertain what chattels or estate the defendant in the execution had, nor whether he made the least inquiry in relation thereto. We cannot doubt that it is the duty of an officer, to whom an execution is directed and delivered, to make at least reasonable exertions to levy the same on the property and

estate of the debtor; and that if he is guilty of gross negligence in this, he is liable. The mere want of knowledge of the debtor's having estate or effects, or an averment that the plaintiff did not point out the estate or effects of the debtor to him, on which to levy, is not sufficient to excuse him. The demurrer was therefore properly sustained. Equally correct was the sustaining of the demurrer to the second plea.

The liability of the sheriff for his negligence had attached before the issuing of the *capias ad satisfaciendum*, and whether the voluntary discharge of the defendant therefrom operated as a satisfaction of the creditor's judgment or not, it could not take away the creditor's remedy against the sheriff for his negligence, which was perfect before such discharge. The right of action of the creditor against the sheriff for his misconduct was in no way affected by such discharge. The plea was then a defective defence, and wholly immaterial.

The second point of variance is not, in our judgment, tenable. The court had the right to suffer the amendment to be made, it being a mere clerical error; and the variance was, even without such amendment, unimportant, because the description of the judgment record set out in the declaration was only an inducement to, and not the *gist* of the action. Numerous authorities may be found of adjudged cases supporting this doctrine.

On the third point, relative to fee-bills, the same rules are to govern as in cases of execution. They are declared by the statute creating them to have the force and effect of an execution, and are to be returned in the same manner. The ninety days having expired before the levy under the fee-bill, it was necessarily *functus officio*, and, consequently, the levy void. It was then properly rejected.

The objection under the last point ought to have been taken advantage of in the court below. It is merely and purely technical, and even then it might be questioned whether the damages in the recital to the declaration, as appears in the record, has not cured the error, if it were one available in the court below. The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

Breese and Baker, for appellant.

Grant, for appellee.

Beebe v. Boyer.

Rager v. Tilford.

Bryan v. Buckmaster.

BEEBE v. BOYER.

Breese App., 20.

Appeal from Greene.

IN appeal causes, if the record is not filed within the time required by law, the appeal will be dismissed on motion.

*Appeal dismissed.**Hall*, for appellee.

RAGER v. TILFORD.

Breese App., 21.

Appeal from Sangamon.

THE same point decided as in the preceding case of Beebe v. Boyer.

*Appeal dismissed.**McRoberts*, for appellant.*W. Thomas*, for appellee.

BRYAN v. BUCKMASTER.

Breese App., 22.

Error to Madison.

1. If, upon a return to an original execution, the sheriff makes no charge for a levy, the clerk has no right to tax the sheriff's fees on the *alias*.

2. The sheriff, in selling property, can only charge his commission upon the sum of money realized.

3. Where no sale is made, the equitable rule would be to charge commissions according to the appraised value of the real estate levied upon.

4. In doubtful cases, if by giving a literal construction to a statute, it will be the means of producing great injustice, and lead to consequences that could not have been anticipated by the legislature, courts are bound to presume that the legislature intended no such consequences, and give such a construction as will promote the ends of justice.

*Judgment reversed.**Semple*, for plaintiff.*Prickett*, for defendant.

Bates v. Jenkins.

Sims v. Hugsby.

Naught v. O'Neal.

Tufts v. Rice.

BATES v. JENKINS.

Breese App., 25.

Appeal from Jo Daviess.

1. A PLEA in abatement will lie in an attachment cause, by which the verity of the affidavit is put in issue.

2. A judgment of nonsuit in attachment is equivalent to a dismissal of the suit.

*Judgment affirmed.**Davis* and *Blackwell*, for appellant.*W. Thomas*, for appellee.

SIMS v. HUGSBY.

Breese App., 27.

Appeal from Morgan.

A NOTE is no part of the record, unless made so by a bill of exceptions, or oyer is craved of it.

*Judgment affirmed.**Hall*, for appellant.*W. Thomas*, for appellee.

NAUGHT v. O'NEAL.

Breese App., 29.

Error to White.

THE repeal of a statute does not affect rights which have already vested under it. The right in this case was a bar to a slander suit, which had already attached under a statute of limitations.

Judgment reversed.

TUFTS v. RICE.

Breese App., 30.

Error to Madison.

A STATUTE of limitations is to be construed prospectively, unless the words are otherwise.

Judgment reversed.

Earnst v. State Bank.	Green v. McConnel.	Cromwell v. March.	Menard v. Marks.
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EARNST v. STATE BANK.

Breese App., 31.

Error to Fayette.

A DEBT due the State Bank is a debt due the State, which the legislative body may release.

Judgment reversed.

Starr, for plaintiff.

D. Blackwell, for defendant.

 GREEN v. McCONNEL.

Breese App., 32.

Appeal from Morgan.

IN appeal causes the transcript of the record must be filed by the third day of the term, or the appeal will be dismissed. Negligence of counsel is no excuse for non-compliance with the positive requirement of the statute. (a)

(a) S. P. Green v. Atchison, Breese App., 33; Smith v. James, *ibid.*, 33; Hagar v. Phillips, 18 Ill. R., 292; Vance v. Schuyler, 4 Scam. R., 286; Funk v. Phillips, 4 *ibid.*, 581.

 CROMWELL v. MARCH.

Breese App., 34.

Error to Morgan.

1. A BOND executed by an attorney must be signed by the agent in the name of the principal.

2. The quashing of a *supersedeas* does not affect the writ of error.

 MENARD v. MARKS.

1 Scam. R., 25.

Error to Peoria.

1. A mortgage constitutes a *specific lien* upon the land described therein.
2. A writ of *scire facias*, to foreclose a mortgage, is not an action in the ordinary acceptation of the term, though it is so technically speaking. It is a proceeding *in rem* merely.
3. A statute is to be construed according to its spirit and the reason upon which it was enacted, and not with reference to its literal interpretation.
4. Where a statute provides that no action shall be instituted against an administrator for a debt due by the intestate, until the expiration of one year after the grant of administration, it does not apply to a *scire facias* to foreclose a mortgage upon land made by the intestate.
5. Where a *sci. fa.*, to foreclose a mortgage, does not set forth the mortgage deed at large, it is not proper to take advantage of the omission by plea in abatement, but by demurrer.

LOCKWOOD, J.—This is a *scire facias* issued against the defendant, as administrator, to obtain a sale of mortgaged premises, pursuant to the statute, Jan. 17th, 1825, entitled “*An act concerning Judgments and Executions.*” The mortgage was executed to the plaintiff by the defendant’s intestate. Upon the return of the *scire facias*, the defendant pleaded in abatement that the *scire facias* was issued within one year after the death of the intestate. To this plea the plaintiff demurred, and the defendant joined in demurrer. On the hearing of the cause in the Circuit Court, the demurrer was overruled, and the plea sustained, and thereupon judgment was given that the *scire facias* be abated and quashed. To reverse this judgment, a writ of error has been brought to this court.

The only question presented by the pleadings, is, whether the 97th section of the act passed 23rd January, 1829, “*relative to Wills and Testaments, Executors and Administrators, and the settlement of Estates,*” forbids the suing out of a *scire facias* to foreclose a mortgage, until after the expiration of one year from the taking out of letters of administration. By the 18th section of the act “*concerning Judgments and Executions,*” passed 17th January, 1825, it is provided in substance, that if default be made in payment of any sum of money, secured by mortgage on lands and tenements duly executed and recorded, it shall be lawful for the mortgagee to sue out a writ of *scire facias* from the clerk’s office of the Circuit Court of the county in which said mortgaged premises may be situated, directed, etc., requiring the sheriff to make known to the mortgagor, or, if he be dead, to his heirs, executors or administrators, to show cause, if any they have, why judgment should not be rendered for such sum of money as may be due by virtue of said mortgage; and upon appearance, the court is authorized to give judgment; but if the *scire facias* be returned *nihil*, an *alias scire facias* may be issued; and if the *alias* be returned *nihil*, or if the defendant appear and plead, or make default, the court may proceed to give judgment with costs; “And also that the mortgaged premises be sold to satisfy such judgment, and may award or direct a special writ of *feri facias* for that purpose. PROVIDED, HOWEVER, that the judgment aforesaid shall create no lien on any other lands or tenements than the mortgaged premises, nor shall any other real or personal property of the mortgagor be liable to satisfy the same.”

The *scire facias* authorized by the above section of the judgment and execution law, is not an action in the ordinary acceptance of that term; but is a proceeding *in rem*. The judgment does not bind the administrator, nor does it affect in the least degree that portion

Menard v. Marks.

Simpson v. Rawlings.

Feazle v. Simpson.

of the intestate's estate that is committed to his charge. If a mortgagee were to be delayed until one year after letters of administration were taken out, it would often happen that years would intervene before he could enforce his lien. No such consequences could have been intended by the legislature.

Administration, except in cases of insolvency, only extends to the personal estate; and the object in forbidding the bringing of an action against an administrator for one year after the taking out of letters of administration, was to enable the administrator to ascertain whether the estate of the intestate were insolvent, in which event the debts would be classed, and paid *pro rata*. The reason for giving this time to ascertain the situation of the estate, does not apply to a mortgage creditor, for he has a *specific lien* on the mortgaged premises, which is not affected by the solvency or insolvency of the intestate's estate. We are therefore of opinion that the demurrer to the defendant's plea, ought to have been sustained.

It was contended in the argument of this case, that the *scire facias* does not set out the mortgage in full. This objection, however, cannot be taken on a plea in abatement.

Judgment reversed.

Bigelow, for plaintiff.

Ford, for defendant.



SIMPSON v. RAWLINGS.

1 Scam. R., 28.

Error to Marion.

A JUSTICE has no jurisdiction of a demand exceeding \$100, though reduced below that sum by legitimate credits.

Judgment reversed.

Davis and Breese, for plaintiff.

Eddy, for defendant.



FEAZLE v. SIMPSON.

1 Scam. R., 30.

Error to Marion.

1. THE issuing of process is the commencement of a suit at law.
2. If a plaintiff has no cause of action at the commencement of his suit a nonsuit is proper.

Feazle v. Simpson.

Clifton v. Bogardus.

Beezley v. Jones.

3. In a declaration for malicious prosecution the plaintiff must aver the termination of the criminal proceeding.

Judgment reversed.

Brown, for plaintiff.

Scates, for defendant.



CLIFTON v. BOGARDUS.

1 SCAM. R., 32.

Error to Peoria.

1. ALL persons are competent witnesses who are not parties to the record, who have sufficient understanding and who are not disqualified by interest, crime, or the want of a proper moral obligation to speak the truth.

2. The interest which is requisite to disqualify a witness, must be in favor of the party calling him.

3. Where the interest of a witness is equally balanced between the contending parties he is competent to testify.

4. In the trial of the right of property the defendant in execution is a competent witness.

Judgment reversed.

Bigelow, for plaintiff.

Ford, for defendant.



BEEZLEY v. JONES.

1 SCAM. R., 34.

Error to Vermillion.

1. WRITTEN instruments, which contain mutual covenants, are not assignable at law, under the statute.

2. A deed containing several covenants is not assignable as to one of them.

3. A covenant for the performance of personal duties is not assignable.

Judgment affirmed.

McRoberts, for plaintiff.

Webb, for defendant.

Reynolds v. Hall.

REYNOLDS v. HALL.

1 SCAM. R., 35.

Error to Fayette.

1. The laws in force at the time of the execution of an undertaking are as much a part of the contract as if they were recited at large in the written instrument which evidences the agreement between the parties.
2. The contract of a surety is to be construed strictly, and cannot be extended beyond the words of his undertaking by implication.
3. The sureties of the State treasurer are not liable for his acts or defalcations as *ex officio* cashier of the old State Bank, such duty having been imposed upon him by a statute enacted subsequently to the execution of his official bond as treasurer of State.

SMITH, J.—This was an action of *debt* brought against James Hall and his sureties, on his official bond, given for the faithful performance of his duties as Treasurer of the State of Illinois, to which office he had been elected on the 28th day of December, 1828, by the vote of the Legislature. The bond is dated on the 16th day of January, 1829, and was approved by the plaintiff in his executive character, on the 22d day of the same month. The condition of the bond, after reciting that the defendant, James Hall, had been elected Treasurer of the State of Illinois for two years, is as follows: "Now, if the said James Hall shall well and faithfully perform the duties of his said office, for and during his said term, then this obligation shall be void; otherwise, it shall be and remain in full force."

The defendants replied—1st. General performance. 2d. That the defendant, Hall, had faithfully accounted for and paid over all moneys received by him, for which his sureties, as State Treasurer, were chargeable in this action, according to the tenor and effect of their bond. 3d. Set-off for certain sums for which the State is indebted to said Hall for moneys deposited in bank; and certain expenditures of said defendant for and on account of said State: to which the plaintiff rejoined and took issue.

On the trial of the cause, a report of the situation of the State Bank of Illinois, at Vandalia, dated on the 1st January, 1831, signed by the said Hall, as treasurer, showing, among other things, that he had received, on account of said bank, considerable sums from the branch cashiers of said bank, in the notes of said bank, was offered in evidence; to the admission of which report as evidence, the defendants objected; which objection was sustained, and to which opinion of the court, in refusing to admit the report as evidence, the plaintiff excepted. The bill of exceptions contains other matters to which it is not necessary to refer, as the additional points reserved in the bill have been, on the argument, abandoned by the plaintiff's counsel. The only point relied on among the causes assigned for error, is the rejection of the report offered as evidence.

On the part of the sureties of Hall, who are co-defendants, it is insisted that no evidence of the receipts of the funds or effects of the State Bank, by Hall, by virtue of the act of the Legislature of 23d January, 1829, or any subsequent law of the State, imposing on Hall, the late treasurer, the duties of cashier of such bank, could be introduced as legal evidence, to charge them with a liability in case of a misapplication of such effects or funds of the bank, by the late treasurer; and this is, as I understand, conceded to be the only point to be examined and determined.

In the consideration of this question, it is necessary to recur briefly to the Constitution of the State, creating the office of treasurer, and the act of the legislature, defining his duties. The office of State treasurer is created by the 21st section of the 3d article of the constitution; and the act of the 24th March, 1819, "*defining the duties of auditor and treasurer*," was the only law in force at the time of the execution, delivery, and approval and acceptance of the bond. The 7th section of the act requires the treasurer to give bond in the sum of \$20,000, and the residue of its provisions relate to the performance of duties, in regard to the fiscal operations of the State Treasury, and nothing else.

Under this law, then, we are to determine the liabilities of the sureties, and whether they can be held responsible for other duties cast upon the treasurer by the act of 1829, after the execution, approval, and acceptance of the bond.

Without examining the question which might here arise, as to what duties might thus be cast upon the treasurer, and their appropriateness, it will be sufficient to inquire into the character of the act of 23d Jan. 1829, entitled "*An act to amend an act, supplementary to an act establishing the State Bank of Illinois, approved January 10th, 1825.*" By the 7th section of that act, it is declared, "that the treasurer shall discharge all the duties required of the cashier of said bank, by the act establishing the State Bank of Illinois." From this provision, it is manifest that the Legislature cast upon the treasurer the office of cashier, and thereby constituted the treasurer cashier of the bank *de facto*. Having by law imposed this new office upon him, and created new liabilities and new duties, of a character not only unconnected with the office of treasurer, but of a diversified and entirely different nature, can it be contended that the sureties on his bond are justly and legally responsible for his want of fidelity in the discharge of this new trust? It will be recollected that the cashier of the bank was required by law to give security in the sum of \$50,000; and why, on the transfer of his duties, additional security of the treasurer was not

required, it is not for this tribunal to determine. No increase of the treasurer's bonds was required; and it is inconsistent with the idea derived from the requirements of the law creating the bank, to suppose that the sum of \$20,000 required by the treasurer's bond, would have been deemed sufficient, when these new and important and responsible duties were thus transferred, by a transfer of the office of cashier.

The question then presented for consideration and decision is, not whether it is within the bounds of legislative competency to impose additional duties on the treasurer connected with his office; nor whether those duties are appropriate or not; but whether, by law, there has not in fact been cast on the treasurer an additional office, and he required to discharge the duties required by law of the former incumbent. If this be so, then it cannot be doubted that such of the defendants as are mere sureties of the treasurer, cannot be holden responsible for the acts of the same individual in the performance of the duties of the office thus cast upon him. But if there can be a doubt entertained as to such an interpretation of the act of 1829, and whether or not it did not cast on the treasurer a distinct and additional office, and the performance of its duties, still there is no rule of law better settled—one which has received the universal sanction of all tribunals—than that the laws in force at the time of the making of contracts, form a portion of their essence, and that they must be considered as entered into with reference to such laws, and be so construed. The act of "24th March, 1819, defining the duties of treasurer," was the only law in existence at the time of entering into the bond; and by it, the rights and liabilities of the respective parties must be ascertained and determined. The sureties, when they signed the bond and entered into the covenant, could not be supposed to look elsewhere to ascertain the nature and extent of their liability. They saw that \$20,000 was the extent, and that the duties which were required of the treasurer, related alone to the fiscal concerns of the State, as defined in that law, and not to duties appertaining to a moneyed institution of a varied and peculiar character. It will be apparent that they could not have anticipated that the Legislature intended, or would have subsequently cast on the defendant, Hall, the office and duties which were in fact so cast, afterward, upon him. ^A Apart, however, from this view of the case, there is another which is considered decisive as to the extent of the liability of the sureties.

• The contract of a surety is to be considered strictly, both in law and equity, and his liability is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and un-

der the circumstances pointed out in his obligation, is he bound, and no further. In a case, also, determined in the United States Court, it was decided that under a bond given on the 4th December, 1813, conditioned for the faithful discharge of the duties of his office, by a collector of direct taxes and internal duties, who had been appointed under the act of July 22d, 1813, by the President, on the 11th of November, 1813, to hold his office until the end of next session of the Senate, and no longer, and was reappointed to the same office, January 24th, 1814, by the President, by and with the advice and consent of the Senate, to hold his office during the pleasure of the President, for the time being, the liabilities of the sureties are restricted to the duties imposed by the collection acts, passed *antecedent to the date of the bond*.

The act of 1829 could not be retroactive in its operations, but was entirely prospective. Although it imposed new and additional duties on the treasurer, of a character in nowise connected with the office of treasurer, and which, if it even be conceded, were mere duties appendant to the office of treasurer, created by the act of 23d January, 1829, and was not the transfer of an additional office on him, and that in the character of cashier, still the liabilities of the sureties could not be enlarged, or changed in any way, from what they actually were prior to the passage of this law.

As, then, the act of 1829 could in nowise interfere with the condition of the bond, could impose no new liabilities, nor in any way change its character or extend its operations, by implication, I am of opinion that the judgment of the Circuit Court should be affirmed.

Separate opinion of Lockwood, Justice.—I concur in opinion that the judgment of the Circuit Court ought to be affirmed, upon the ground that the sureties of the treasurer could not have contemplated any such increase of their responsibility as necessarily took place by transferring the duties of cashier of the State Bank to the treasurer. Such additional responsibilities not being within the intention of either of the parties to the bond when it was executed and accepted by the governor, to hold the securities responsible for the acts of the treasurer, growing out of his management of the affairs of the Bank, would violate a well settled rule, that a surety cannot be held beyond the express terms of his undertaking, as understood by the parties, when the contract was entered into.

Judgment affirmed.

Cowles, for plaintiff.

Cavalry and *McRoberts*, for defendants.

Beaird v. Foreman.

BEAIRD v. FOREMAN.

1 Scam. R., 40.

Error to St. Clair.

If a sheriff or coroner collects and fails to pay over moneys due the plaintiff in execution, the injured party has the option to proceed under two different statutes, in a summary way, by motion, in one of which the latter may recover twenty per cent. interest, and in the other ten; and in the first mentioned remedy the sheriff or coroner may likewise be punished for contempt. The statutes are not inconsistent.

BROWNE, J.—This case is brought into this court on a writ of error from the St. Clair Circuit Court. It appears from the record, that the defendant in the court below, as sheriff of St. Clair county, had collected on an execution in favor of the plaintiff, against Joseph Chance, John Bird and William Kinney, defendants in a replevin bond, the sum of \$155 28½, which he did not pay over on request to the said plaintiff. A motion was thereupon made against the said sheriff, on due notice given under the 30th section of the practice act of 1827, for judgment against him for said sum and 20 per centum thereon, from the time of collection till paid; and a judgment was accordingly rendered at the March term, 1828, against the said sheriff, in these words: "This day came the said plaintiff by her attorney, and satisfactory proof having been made to the court of the service of the notice according to law, and it appearing to the court that the said defendant received the sum of \$155 28½, it being the debt specified in said execution, and that he has been requested to pay over the same to the plaintiff, and hath failed so to do; and the said defendant declining in open court to make defence, it is therefore considered by the court that the said plaintiff do recover of the said defendant the said sum of \$155 28½ for her debt, and also interest, to be computed thereon at the rate of 20 per centum per annum, from the 14th August, 1827, being the return day of said execution, until paid, for her damages, for failing to pay over the said money." It is contended, in the assignment of errors, by the counsel for the plaintiff in error, that this judgment is erroneous, because it awards 20 per centum per annum interest, as damages, instead of 20 per centum damages merely, upon the amount withheld: this position must be determined by the terms and intention of the statute which gives the remedy. By the act before referred to, a summary remedy is provided against sheriffs who shall neglect or refuse to return an execution, or who shall neglect or refuse to pay over money collected by them on execution. By giving such sheriff ten days' notice in writing, the plaintiff in the execution may have relief on motion in the Circuit Court, namely, an order upon the officer, and process of attachment, if necessary, to enforce it, when a return of the execution merely is sought; and when

money has been collected, and withheld, a judgment may be rendered, after the proper steps, for the amount, with 20 per centum thereon, from the time of collection till paid. There being no question made by the assignment of errors, as to the regularity of such a judgment, the decision in this case must depend upon the construction of the words, "20 per centum from the time of collection till paid." That this means interest to be computed at that rate, for the time the money is withheld, whatever that time may be, the court has no doubt. The words, "from the time of collection till paid," would otherwise be insignificant and absurd. The legislature doubtless intended to take away from the sheriff all inducement to apply to his own use money collected by him; and a less rate of interest than 20 per centum in a country without usury laws, and where money is not more plenty than it ought to be, might not have removed the temptation which sheriffs sometimes very possibly fall into, to speculate upon the money of others in their hands. Common interest, with 20 per centum damages upon the amount when withheld for a long time, might, and in this State, often would, leave the sheriff a gainer by his breach of duty; and on the other hand, it might be no amends to the unfortunate plaintiff, who relied upon the prompt collection of his debt. Another provision of the statute, giving ten per centum, not as interest, but as damages, on the amount collected, has been referred to in the course of the argument as having a bearing upon this point. It is section 14th of an act of 1827, respecting sheriffs and coroners, and is an independent remedy applicable to the case, but which the defendant may not choose to pursue, the remedy being less efficacious. The two provisions are alternative. It is at the option of the plaintiff in the execution, to resort to whichever he pleases. When money has been retained but a short time, it would afford a more adequate satisfaction than the provision of the practice act, giving 20 per centum interest for the time the money was collected. In this view of the case, and the court can see it in no other, the two provisions are perfectly consistent and proper. They both look to the security of the party whose money is improperly withheld, and to the prevention of such conduct in officers, by wholesome damages. The judgment is therefore affirmed with costs.

Judgment affirmed.

Snyder and Semple, for plaintiff.

Cowles, for defendant.

BOWERS v. GREEN.

1 Scam. R., 42.

Error to Jackson.

1. Clark v. Ross, Breese R., 261, *overruled*.
2. A writ of error is a writ of right, and cannot be denied except in capital cases, when cause must be shown.
3. Statute penalties are in the nature of punishments.
4. A justice has no jurisdiction to enforce a penalty, unless such power is expressly conferred upon him.

LOCKWOOD, J.—Green sued Bowers before a justice of the peace to recover the penalty of \$5, inflicted by the 14th section of the "*Act regulating Mills and Millers*," passed 9th February, 1827, for taking more toll than is allowed by the 11th section of said act.

Green recovered before the justice, and the cause was removed by appeal to the Circuit Court of Jackson county, where the judgment of the justice was affirmed for \$5. To reverse this judgment, the cause is brought into this court by writ of error.

A preliminary objection has been raised, whether a writ of error will lie in a case where the recovery is under \$20, exclusive of costs; and to support this objection, the case of *Clark v. Ross* has been cited. If the decision of that case was correctly made, then the objection is well founded, and this cause ought to be dismissed for want of jurisdiction in this court. The maxim, *Stare decisis*, is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried so far as to preclude courts from investigating former decisions when the question has not undergone repeated examination, and become well settled. Wherever the construction of a statute has been repeatedly given in the same way, or where a construction has been given and acquiesced in for a number of years, it would be manifestly improper for a court to disturb questions thus settled. But the cause of *Clark v. Ross* is the only case in which this court have been called on to settle the right of parties to bring writs of error to this court, and that decision has not, it is understood by the court, given satisfaction to the bar.

Under these circumstances, I think it the duty of this court to revise that decision. That decision is based upon the idea that writs of error are in their nature appeals, because the Constitution only gives this court appellate jurisdiction, except in certain cases; and the legislature, by limiting appeals to cases where the judgment, exclusive of costs, should amount to \$20, had used the word "appeals" in its broadest constitutional sense, and thereby included writs of error. Were the court right in giving this construction to the word "appeals?" At common law, the only mode of removing a cause from

an inferior court of record to a superior court for reversal, was by writ of error; and this writ was a writ of right, which could not be denied, except in capital cases. To obtain a writ of error, it is necessary to apply to the clerk of the Supreme Court, and then it does not operate as a stay of execution, unless an order is obtained from a judge for that purpose. From this statement, it is obvious that considerable delay would intervene before a writ of error could be obtained; and in the meantime an execution could be issued on the judgment, and a party, against whom an erroneous judgment had been given, might be put to considerable trouble and expense.

To remedy this evil, it is fairly presumable that the legislature gave the additional remedy by appeal. By taking an appeal, which is done when the judgment is rendered, the effect of the judgment is entirely suspended until the appeal is decided. From this view of the subject I am satisfied that the legislature, in authorizing parties to take "appeals," used that term as descriptive of the mode, and only intended to give a more expeditious and less expensive means of taking a cause from an inferior to a superior court. An appeal ought, therefore, to be considered as a cumulative remedy, and, consequently, any restriction upon the right to use the remedy cannot, with propriety, be extended to other modes of redress provided by law. This construction is fortified by the consideration that, by an act passed January 19th, 1829, entitled "*An act regulating the Supreme and Circuit Courts*," which act seems not to have been noticed by the court in the former case, the remedy by appeal and error are noticed as different modes of bringing causes into this court.

Another consideration is entitled to great weight in arriving at a correct result on this question; and that is, that much injustice must necessarily result from the decision in *Clark v. Ross*, if adhered to. Many cases might be stated where a party would be entirely deprived of redress where manifest injustice has been done in the court below. I will only state one case to illustrate the great impropriety of sustaining the decision of *Clark v. Ross*. A. brings an action on a note for \$1,000, and the court below, by an erroneous decision, reduces the debt under \$20; or by such wrong decision, a verdict is given for the defendant. Now, if the case of *Clark v. Ross* is to be deemed law, A., in the supposed case, would be entirely without remedy. Can it be supposed that the legislature intended any such injustice? And ought this court to sustain a decision, unless compelled by express legislative enactment, which will produce such results? The old and salutary rule of the common law, that a writ of error is a writ of right, and cannot be denied, except in capital cases, ought not to be abolished

by implication and construction, and particularly where it is evident that the legislature could not have contemplated its repeal. We are therefore clearly of opinion that the case of *Clark v. Ross* ought to be overruled.

Having disposed of this preliminary question, I come to the assignment of errors in this cause. The first assignment is, that a justice of the peace had no jurisdiction of the subject matter of this suit. The statute giving the penalty authorizes the party injured to sue for the penalty in any court having a cognizance thereof. The question here arises, have justices of the peace any jurisdiction over penal actions? By a careful examination of the several cases enumerated in the general act giving justices of the peace jurisdiction, I am satisfied the legislature only intended—and such is the obvious import of the act—to confine their jurisdiction to actions arising on contract. An action of debt for a penalty inflicted by statute can in no sense be considered as an express or even an implied contract. Statute penalties are in the nature of punishments, and persons who incur their liabilities are considered as *tort feorsors*.

In relation to what courts have cognizance of penal actions, the following rule is laid down in *Espinasse on Penal Statutes*, to wit: “With respect, however, to statutes giving jurisdiction, a difference must be observed as to the superior and inferior courts. *The courts above may have jurisdiction by implication*, as in the cases of penal statutes mentioned before, such as *Rex v. Mallard*, ante, fol. 9, prohibiting any matter of public concern under a penalty, but without appropriating it, and which is a debt due to the crown, and recoverable in the Court of Exchequer. That might be sued for in the courts above, though they are not named; *but no inferior court or jurisdiction can have cognizance of any penalty recoverable under a penal statute by implication*. They must be expressly mentioned in the statutes themselves, and cognizance given to them in express terms.” Jurisdiction not having been given expressly to justices of the peace, we are of opinion that the justice in this case had no jurisdiction, and the judgment of the Circuit Court, for this reason, must be reversed with costs. Other errors have been assigned and argued, but the court not being entirely satisfied relative to them, give no opinion.

Judgment reversed.

Breese and Cowles, for plaintiff.

Baker and Field, for defendant.

Clemson v. State Bank of Illinois.

Bailey v. Campbell.

Humphreys v. Collier.

CLEMSON v. STATE BANK OF ILLINOIS.

1 SCAM. R., 45.

Appeal from St. Clair.

1. A PARTY cannot assign as error his own mistake.

2. Two defendants—one served with process, the other not; the party served employs an attorney; the latter interposed a demurrer, which apparently recognized the appearance of both defendants; this demurrer was overruled—thereupon the attorney filed pleas in behalf of him only who had been served—held that the other defendant was not in court.

3. It is not error to render a final judgment upon plaintiff's demurrer to a bad plea.

4. A writ of inquiry is unnecessary where the damages rest in computation.

*Judgment affirmed.**Simple*, for appellant.*Cowles and Ford*, for appellee.

BAILEY v. CAMPBELL.

1 SCAM. R., 47.

Error to La Salle.

A PARTY cannot assign for error a decision in his own favor.

*Judgment affirmed**Bigelow*, for plaintiff.*Ford*, for defendant.

HUMPHREYS v. COLLIER.

1 SCAM. R., 47.

Appeal from Randolph.

1. On an issue in fact, the parties are only required to prove the *material* allegations in their respective pleadings.
2. Instructions must be based upon the evidence; and where there is no proof to base the instruction upon the court may refuse it as an abstract proposition.
3. The assignor of a note, who indorsed after maturity, is liable to refund to the assignee, if, at the time of the assignment, the maker was insolvent.

SMITH, J.—This was an action brought by the appellees against the appellant in the Circuit Court of Randolph, as the assignor of a promissory note of hand, under seal, to recover the balance due at the time of the assignment, and still remaining unpaid. The declaration

Humphreys v. Collier.

alleges the making of the note, and the assignment and delivery to Collier and Powell; and then specially avers that at the time of such assignment there existed a total inability of the maker to pay the same, and that payment could not be coerced by the ordinary course of law; that a suit would have been unavailing to compel the maker to pay the same, by reason of his total want of property to be reached by an execution upon any judgment which might have been obtained by suit against him on said note; that the maker has not paid, or caused the said balance to be paid to them, or any part thereof, but has wholly refused, of all which the appellant had notice. To this count was added a count for goods, wares, and merchandise, sold and delivered, and the usual money counts. The defendant in the court below pleaded the general issue, and payment to the second and third counts, to which plea of payment there were a replication and issue.

During the progress of the trial various instructions were prayed for by both the plaintiffs' and defendant's counsel in the court below. It is not esteemed important for the consideration of the present case to examine the correctness of but two, which are contained in the bill of exceptions. The first was prayed for by the defendant's counsel, and is as follows: "That, should the jury be of opinion that the note of said Barcroft was not received in full payment of the goods purchased by the defendant of the plaintiffs at the time it was indorsed, at their own risk; that then, before the plaintiffs can recover in this case against the defendant, as indorser of the note, the plaintiffs must prove a demand of payment from Barcroft, and notice to the defendant, or at least that they demanded payment of Barcroft." The refusal of the Circuit Court thus to instruct the jury is assigned for error, and we are now to consider whether it is in fact so. An obvious answer is to be given to this objection; no rule is certainly better settled than that which holds a party to the proof only of the material averments in his declaration. We shall look in vain into the first count for an averment that a demand of payment was made, and notice of non-payment given to Humphreys. The plaintiffs have based their right to recover, not on the ordinary liabilities of an assignor of a note or sealed instrument of writing for the payment of money, but on the avowed insolvency of the maker at the time of the assignment of the note in question, and have framed the count on the note upon such a supposed state of facts. It is therefore most manifest, that to have required proof of demand and notice would have been to have required proof of matters not in issue, but entirely foreign to the issue. The defendant having taken issue on the facts contained in the declaration, it was sufficient for the plaintiffs, by proof, to sustain the mate-

rial averments therein contained, and they could not be called on to prove more. If demand and notice were necessary and material averments, the defendant should have demurred to the declaration, and not pleaded in chief. But as the declaration is evidently framed with a view to that portion of our statute relating to promissory notes, bonds, due bills, and other instruments in writing, making them assignable, which requires due diligence to be used to first collect the amount from the maker by suit, except where the institution of such suit would have been unavailing, it may become necessary and proper to consider whether, under the second section of that act, in relation to a case of notorious insolvency, when the note becomes due, demand of payment from the maker, and notice of non-payment to the assignor, are necessary to be averred and proven before a party shall be entitled to recover.

From a consideration of the causes which gave rise to the laws which exist in, and govern, states and countries greatly commercial, it will be evident that many of the principles applicable to a commercial people, in the negotiation of assignable, indorsable, and transferable paper securities, and instruments for the payment of money, would but ill suit the condition of a people so purely agricultural as we are; and hence the impolicy of adopting the principles and rules of decision which have been made in states and countries that have adopted the law of merchants in relation to negotiable paper. It must be recollected, that the British decisions are not only different, for the reasons assigned, but the statutes of Anne, under which most of them have been made, differ in material points from ours. We are not only, then, restricted from adopting their rules where inapplicable, but we are prohibited by the express terms of our own laws, which have been framed and adopted, doubtless, as being more congenial to our modes of transacting such negotiations, and as better calculated to insure equitable and legal liabilities between parties. The construction of that portion of our statute, it would seem, is of easy interpretation. If the suit, which it requires to be prosecuted as the evidence of the means of diligence, would have been unavailing, then it is declared—the assignee may maintain an action against the assignor, as if due diligence, by suing, had been used.

Now, in what case, more than in the case of an absolute and entire insolvency of the maker of a note or bond, can it be imagined that a suit would be unavailing? It seems difficult to conceive a case more apposite or more comprehensive in its nature: indeed, it might be said to have been the very case to which the exception of the statute was intended to apply; and as the statute has also made the same

Humphreys v. Collier.

Bates v. Wheeler.

exception in cases where the maker has absconded or left the State, it cannot, perhaps, be so readily perceived what other state of facts could well exist to meet the application of a further exception. Satisfied that such were the objects of its framers, we are bound to consider that, in cases of notorious insolvency of the maker of an assignable instrument, contemplated by our statute, after it becomes due, and so continuing up to the time of action brought, the assignor must be liable to his assignee.

On the second point of instructions, which were asked by the plaintiffs, in relation to the laws of Missouri, as applicable to the case before the court, it is proper to remark, that it nowhere appears in the declaration, nor, indeed, in any part of the record, that the note or assignment was made in Missouri; nothing appears in the bill of exceptions to show that there was any evidence that the assignment or transfer of the note took place there; and yet such must doubtless have been shown by evidence, for on that ground alone could it be imagined that the Circuit Court would have instructed the jury that the laws of Missouri, as to the contract, were to govern them. If this had appeared, and we could see with judicial eyes that the contract was made there, then doubtless the instructions, as to those laws, would have been correct. In the absence, however, of that fact, and much as it is to be regretted that omissions of this character (if it be one in the present case), which might have been remedied in a moment, should become available here, to destroy the fruits of a recovery; still, as there is no discretion left under such circumstances, the judgment of the court below is reversed, and the cause remanded to the Circuit Court for further proceedings, not inconsistent with this opinion.

Judgment reversed.

Baker, for appellant.

Breese, for appellee.

BATES v. WHEELER.

1 Scam. R., 54.

Appeal from Madison.

1. He who seeks equitable relief must offer to perform his obligations to his adversary.
2. On a bill for a specific performance, the complainant must aver a full performance of his undertakings.

SMITH, J.—The appellant filed his bill in equity in the Court below, to compel a specific performance of a contract in writing, entered into between him and the defendant, by which the defendant covenanted

to convey a good title to certain real estate lying in the military tract of this State. The complainant, in his bill, alleges, "that he has paid the whole consideration of said land, and that he has frequently demanded a deed of the defendant." The case does not require a specific enumeration of its progress and determination in the Court below; it is sufficient to say, for the purpose of its present consideration, that it was put at issue by a replication to the defendant's answer, testimony taken, and finally heard, on bill, answer, replication, exhibits, and evidence of several witnesses, whose testimony is embodied in the form of depositions. At the hearing, the Circuit Court dismissed the bill, and adjudged that the complainant should pay costs to the defendant. From this judgment the complainant appealed; and we are now to determine whether the Circuit Court erred in the rendition of its decree.

The inquiry on the merits and equity of the complainant's case, demands an examination into the allegation of his bill—whether the consideration money has been paid, or the terms and condition upon which the defendant had engaged to make the conveyance, have been complied with; for it will not be denied, that unless such is evidenced, by the proof in the cause, or has been admitted by the defendant in his answer, the complainant has no right whatever to demand a specific performance of the contract. What, then, is the testimony? It appears that the consideration for the land in question, was a certain mare, and five dollars in a note on an individual, payable in plank. This animal and the note are to be delivered to defendant, and upon which the conveyance is to be made. The mare is delivered, but is again returned (but refused to be received by the complainant) on the alleged ground of a deceit—being said to be defective. It is not proposed to inquire into the truth or reality of the alleged deceit; nor whether, indeed, it was practised, inasmuch as the proof incontestably shows—and it is indeed established also by one of the complainant's witnesses—that the note for five dollars was a part of the consideration; and that the complainant has failed to establish the delivery of the note in question, or the payment thereof, or an offer so to do to the defendant. This was a precedent condition, the performance of which was essential, before the complainant could seek a compliance, on the part of the defendant, in the conveyance of the land. He who seeks equity, must do equity; and as the failure of the complainant to comply with the bargain has been plainly established, the decree on the merits and equity of the case seems very apparent.

Decree affirmed.

Semple and Breese, for appellant.

Cowles, for appellee.

Church v. Jewett.

Clark v. Harkness.

CHURCH v. JEWETT.

1 SCAM. R., 55.

Error to Monroe.

A PERSONAL judgment cannot be rendered against administrators.

*Judgment reversed.**Semple*, for plaintiff.*McRoberts*, for defendant.

CLARK v. HARKNESS.

1 SCAM. R., 56.

Error to Adams.

1. Ordinarily the Circuit Courts are limited in their jurisdiction to parties defendant, who reside or are found in the county in which they sit.
2. But they have jurisdiction to send process to a foreign county, where the contract is specifically made payable in the county from whence the process issues, or when the cause of action accrues there, and the plaintiff resides in the county in which the suit is instituted.
3. The declaration in such cases must aver the jurisdictional facts. (a)

SMITH, J.—This was an action of *debt*, commenced on an award in the Circuit Court of Adams county. The summons was directed to the sheriff of the county of Morgan, and made returnable to the Circuit Court of Adams county, and is in the usual form, except that the amount of the debt claimed is not specified.

Among several points made is one of importance, which goes to the jurisdiction of the Circuit Court. It is contended that the Circuit Court of Adams could not entertain jurisdiction of the cause, because it does not appear from the record, that the cause of action arose in that county, or that the debt was specifically payable there. It is obvious, on general principles, as well as law, that the circuit courts are limited in their jurisdiction to the several counties in which they are erected, unless there shall be, by some particular law, an express power extending that jurisdiction in specified and enumerated cases. With respect to the emanation of process, and the power to reach defendants who reside out of the particular county in which the court exists, and to compel their appearance, it is necessary to examine the act of the legislature of 30th December, 1828. By the provisions of that act, which is emendatory of the "*Act concerning Practice in Courts of Law*," of 1827, it is provided, that "it shall not be lawful for a plaintiff to sue a defendant out of the county where the latter resides, or may be found, except in cases where the debt, contract, or cause of action accrued in the county of the plain-

tiff, or where the contract may have, specifically, been made payable." By this provision, it was intended to change and restrict a practice, which existed under the act of 1827, of compelling the appearance of a defendant in any county in the State, where a creditor might elect; a most oppressive and injurious practice, which was intended to be prohibited in future. It would, perhaps, be proper, before a writ emanates, that the officer of the court from which it is prayed, where it is sought to compel the attendance of a person from another county, should require an affidavit of the party, or his agent or attorney, that the cause of action accrued there, or that the contract was specifically payable there, according to the provisions of the act of 1828. It is not intended, in construing this provision, to say, that because this was not done in the present instance, that there is a want of jurisdiction; but still it is essential, in my judgment, that there should be a special averment in the declaration, of one of the causes enumerated in the act of 1828, to give jurisdiction. A circuit court, though an inferior court in the language of the constitution, still, I am willing to concede, is not so held by the common law, nor the statutes of the State conferring its jurisdiction. The caution and jealousy with which the acts of inferior tribunals have been viewed, is not applicable to them; but they are, on the contrary, to be viewed with a spirit of enlarged and enlightened liberality, in favor of the regularity of their proceedings. A circuit court, however, is of limited jurisdiction, and has cognizance, not of causes generally, but of such only as arise within the county.

Now, from the face of the writ in this case, the fair presumption is, that the court has not jurisdiction; but that the case is without its jurisdiction, the writ being directed into another county. This renders it necessary—because the proceedings of no court can be deemed valid, further than its jurisdiction appears, or may be fairly presumed—to set forth upon the record, the facts which give jurisdiction expressly, or such as by legal intendment may render that jurisdiction certain. If we apply this reasoning to the case before us, we shall look in vain into the record for an averment of the existence of any one of the causes enumerated in the act of 1828, upon which the Circuit Court could exercise the jurisdiction specially given in such cases. It was necessary that the causes which gave the court the right to entertain jurisdiction, should have been specially set forth; and as that has not been done, it seems to follow, as a consequence, that the cause was without its jurisdiction.

A course of decisions in the Supreme Court of the United States, in regard to the alienship and residence and citizenship of suitors in

Clark v. Harkness.

Scott v. Thomas.

the circuit courts of the United States, which are considered analogous in principle, has been adopted; and by which it is declared, that "the facts upon which the jurisdiction arises, must be either expressly set forth, or in such a manner as to render them certain by legal intendment." In the case of *Turner, administrator, v. Bank of North America*, where a note was drawn by the defendants, in favor of Biddle & Co., who were described as "using trade or merchandise in partnership together, at Philadelphia, or North Carolina," it was declared, the description of the promisees contained no averment that they were citizens of a State, nor any which by legal intendment could amount to such averment, and that it was error.

Judgment reversed.

Ford and McConnel, for plaintiff.

Cavalry, for defendant.

(a) *Vide* *Kenny v. Greer*, 13 Ill. R., 482, where all antecedent cases were *overruled*.

SCOTT v. THOMAS.

1 Scam. R., 58.

Appeal from St. Clair.

A parol promise to pay the debt of a stranger is void under the statute of frauds.

WILSON, C. J.—The declaration of Thomas, the plaintiff below, contains three counts. The first charges that William Biggs, and William Biggs, jr., were indebted to him by note, and that in consideration that he would forbear until the next term of the court, to sue on the same, that Scott, the defendant, promised if the Biggs did not pay it, that he would; and that he, Thomas, did forbear to sue, but that neither the Biggs nor Scott had paid the same. The second and third counts charge that in consideration of forbearance to sue the Biggs on said note, the defendant promised, if the Biggs did not pay it by the next Court, that he, defendant, would foreclose a mortgage which he held from the Biggs, upon a tract of land, and that the plaintiff might buy it in for \$1 25 per acre, if it would not sell for more; and after satisfying his own debt, pay the surplus, if any, over to defendant; and that he did forbear to sue, and that the note was not paid, and the defendant did not foreclose his mortgage, and permit the plaintiff to buy in the land, and satisfy his debt. To all these counts the defendant pleaded, 1st, non-assumpsit; 2d, that the promises, if made, were by parol, and therefore void by the statute of frauds and perjuries. To the second plea, the defendant demurred, and the court sustained the demurrer. A trial was had on the plea

Scott v. Thomas.

Marston v. Wilcox.

of non-assumpsit, and a verdict and judgment given for the plaintiff. Several exceptions were taken to the instructions given to the jury, and to the opinion of the court in refusing to give instructions asked for. It will be unnecessary to notice these exceptions, as the question raised by the decision of the court upon the demurrer to the declaration, will settle the case. In the argument of this case, a distinction was attempted to be drawn between a promise to pay the debt of another, and a promise to do some collateral act by which such payment might be obtained. No such distinction, however, is recognized by any of the cases relied on, nor does any such exist. If the act promised to be done, is in its consequences to operate as a discharge of the debt of another, the circuitry of the process by which that object is proposed to be effected, does not vary the principle of the case.

The promise, as charged in the second and third counts of the declaration, was in effect to pay the debt of the Biggs, but out of a particular fund, and in a particular way, in consideration of forbearance. This agreement is clearly within the statute of frauds and perjuries. The distinction in relation to promises under that branch of the statute applicable to this case, is that where the moving consideration for the promise is the liability of the third person, there the promise must be in writing; but if there is a new consideration moving from the promisee to the promisor, as where he gives up some lien or security, there the superadded consideration makes it a new agreement, for the performance of which no third person is liable, and, consequently, it is not within the statute.

In the present case, the only moving consideration for the defendant's undertaking, is the liability of the Biggs. No advantage can accrue to the defendant; his promise is a collateral one, and being by parol, is void, under the statute.

Judgment reversed.

Semple, for appellant.

D. Blackwell, for appellee.



MARSTON v. WILCOX.

1 SCAM. R., 60.

Error to Hancock.

The probate courts of this State possess an *incidental* power to revoke letters of administration obtained by fraud. (a)

LOCKWOOD, J.—The only question presented in this case for consideration is, whether a Judge of Probate, after he has granted letters

of administration, can revoke them upon the ground that they were obtained by fraud. The "*Act relative to Wills and Testaments, Executors and Administrators, and the Settlement of Estates*," passed January 23d, 1829, is very broad in giving jurisdiction to courts of probate. By the 15th section of that act, courts of probate "shall hear and determine the right of administration of estates of persons dying intestate; and to do all other things touching the granting of letters testamentary, and of administration, and the settlement of estates according to right and justice, in such manner as may be prescribed by law."

On an application in this case, the Court of Probate decided that Wilcox, the administrator, had obtained the letters of administration by fraudulently representing that he was a creditor of the intestate, when in truth he was not—and proceeded to revoke the letters. Upon appeal to the Circuit Court, that court decided that the Court of Probate was a court of special limited jurisdiction created by statute; and that it could not have or exercise any other or greater power and discretion than is particularly specified and permitted by the acts of the General Assembly, from which it derives its existence; and upon that ground, reversed the decision of the Court of Probate, without investigating the facts of the case.

The position of the Circuit Court is undoubtedly correct, that Courts of Probate are created by statute, and to the statute we must look to ascertain the extent of their jurisdiction. But has not the Circuit Court put too limited a construction upon the extent of the jurisdiction conferred on courts of probate? When the legislature vested in courts of probate the power to "hear and determine the right of administration," it necessarily conferred all those incidents which are necessary to arrive at a correct determination. The granting of administration is necessarily an *ex parte* proceeding, and consequently the Court of Probate is liable to be imposed on by applicants for administration. If, then, letters be obtained by a fraudulent representation, is it not a necessary incident to the right "to hear and determine," that the court should have power to inquire whether any such fraud has been practised? We think the right to inquire whether a fraud has been practised, is a necessary incident to the jurisdiction conferred by the statute. In England, the courts which have authority to grant letters of administration, are courts of inferior and limited jurisdiction; yet it has there been frequently decided, that, "If administration be granted to a wrong party, in such case, the Ordinary may repeal it, and grant it to another, for he has not executed his authority; and it is a power incident to every court to

Marston v. Wilcox.

Bogardus v. Trial.

McKinley v. Braden.

rectify its errors." It also appears by a note in Toller, that in Pennsylvania, "The Register's Court has a right to revoke letters of administration where they have issued improperly, and direct new letters to issue to the proper person." From these authorities, and from the reason of the case, we are of opinion that the Circuit Court erred in reversing the decision of the Court of Probate, upon the ground assumed by the Circuit Court, and consequently the judgment of the Circuit Court must be reversed with costs, and the cause remanded for further proceedings.

*Judgment reversed.**A. Williams*, for plaintiff.*Pugh* and *Whitney*, for defendant.

(a) The statute confers express power to revoke such letters. Cooke's Stat., 1187, sec. 81.

BOGARDUS v. TRIAL.

1 Scam. R., 63.

Error to Peoria.

1. A SPECIAL demurrer must assign the causes.
2. The copy of a note attached to, forms no part of the declaration.
3. A *special* count on a note, and the common counts, may be joined in the same declaration.
4. A defendant may crave oyer of a note, demur, and avail himself, in this manner, of a variance between the pleading and proof.

*Judgment reversed.**Bigelow*, for plaintiff.*Ford*, for defendant.

McKINLEY v. BRADEN.

1 Scam. R., 64.

Error to Madison.

THE general issue admits the capacity in which an administrator sues.

*Judgment affirmed.**Semple*, for plaintiff.*D. Blackwell*, for defendant.

MADISON COUNTY v. BARTLETT.

1 Scam. R., 67.

Error to Madison.

1. Interest is the legal damages or penalty for the unjust delay in the payment of money due to another.
2. A county is not bound to pay interest on its orders upon the treasury.
3. A county cannot be guilty of *laches*.
4. A county order "for \$16 50, or its equivalent in State paper," is payable in full in coin, or as many State paper dollars as will make the sum named in the order, according to the current value of the State paper.

Lockwood, J., delivered the opinion of the Court :

These causes come into this court, upon agreed cases from the Madison Circuit Court. Two questions are presented for our consideration : First, Is the county of Madison bound to pay interest on county orders, from their date until paid, drawn in the following manner, to wit : "September Term of the Commissioners' Court, 1822. Ordered, that David Sweet be allowed \$8 for eight days attendance, as constable, upon the Circuit Court of Madison county, at May Term, 1820, as per order of the Circuit Court. Attest, Joseph Conway, clerk." Second, Is said county bound to pay interest from date until paid, and advance on county orders drawn in the following manner, to wit : "December Term of the Commissioners' Court for Madison county, 1825. Ordered, that William Moore be allowed the sum of \$1, or its equivalent, in State paper, for services as a judge of a special election last month, as per voucher filed. Attest, Hail Mason, clerk." Or, in other words, when State paper was worth, when the order issued, only one-third of a dollar, is the county bound, in discharge of such order, to pay \$3 in money, and interest on \$3 from the date of the order until paid ?

It appears from the agreed cases, that there was no money in the County Treasury from the year 1820, until the year 1830, during which time all the orders in controversy were issued. It further appears from the cases, that Bartlett was treasurer of the county of Madison, and that as treasurer, he settled with the sheriff, without the consent of the Commissioners' Court, and allowed him interest on specie orders, and interest and advance on equivalent orders, so that if he was justified in making the allowances of interest and advance, the county would fall in debt to the county treasurer in the sum of \$870 86, for which sum he would be entitled to judgment. But if the court should be of opinion that the county was not bound to pay interest on specie orders, and advance and interest on equivalent orders, then, by the cases, the court is to render judgment against Bartlett for \$790. "It is further agreed by the cases, that the taxes for 1828 were due 1st December, 1828, the taxes for 1829 were due 1st March,

1830. It is also agreed that the said treasurer paid in when due, 1st December, 1828, \$871 06, which he had received from the sheriff on the tabular form for 1828, on which no interest or advance was claimed. That he also paid in, in like manner, on the tabular form of 1829, \$726 80, on which no interest or advance was claimed." Other stipulations and facts are contained in the agreed cases, which it is not material to notice.

Is a county bound to pay interest on county orders, from the day of their issuing until paid? In order to a full understanding of this question, it will be proper to inquire into the nature of the indebtedness of the counties, which require the issuing of the orders in question.

By law, the counties are compelled to allow county officers compensation for their services, which are generally fixed and ascertained; but the greatest portion of their indebtedness arises from contracts to build and repair court-houses, jails, and bridges, and for supporting paupers. For these and similar county expenses, it is evident that the county has no fixed or settled rule to regulate the amount it will have to pay. In these cases, the sum agreed to be paid will necessarily depend, in a great measure, upon the time that will probably intervene between the period of rendering the labor or services, or furnishing materials, and the payment of the money. If payment is likely to be delayed for a long and uncertain time, the county will be under the necessity of agreeing to pay a much higher price for labor, services, and materials, than it would if it were certain that the money would be in the treasury when the time of payment should arrive. Consequently the price of labor or property will always be in proportion to the risk and delay of payment. It is also proper here to inquire, what is meant by the word "interest?" At common law, interest is the consideration or price that is agreed between parties, to be paid for the use of money for a stipulated time. At common law, if no agreement for interest be made, it cannot be recovered, although the payment of the debt should be unreasonably delayed. The following case settles this principle, to wit: the case of *Challie v. the Duke of York*; K. B. Sittings after Easter Term, 46 Geo. 3d, at Weston, MSS., which was an action of assumpsit for wine sold and delivered, and for money due on an account stated. On the trial, it was proved that the wine was delivered in the year 1799, and in the year 1800 the account was stated and settled by an agent of the duke, and the sum of £300 was admitted to be due to the plaintiff. Upon this evidence the counsel for the plaintiff claimed interest upon this sum from the time of the settlement of the account,

to the day on which the plaintiff would be entitled to final judgment; and in support of this claim a case in 3d Wilson's R., 205, was cited. But Lord Ellenborough, Ch. J., before whom the case was tried, said, "Interest is never allowed for goods sold, or on an account stated; except there be an express agreement, or the money is to be paid on a particular day; and I believe the case cited has never been acted upon."

This case, decided by Lord Ellenborough, is precisely analogous to county orders. These orders are a mere liquidation of the sum due, on a settlement of accounts against the county, but without fixing any time for payment. They are, therefore, only to be considered as an authority for the holder to receive the money whenever it is in the County Treasury. To remedy this defect of the common law, interest is given by statute in certain specified cases, from the time that the debt becomes due, until payment is actually made. Hence statute interest may properly be defined to be the legal damages or penalty for the unjust detention of money.

From this view of the subject, it will appear that in the greater part of the cases where counties contract debts and issue their orders for payment or compensation, the probability of delay or uncertainty in the time of payment, has been estimated in the enhanced price agreed on for the services, work, or materials contracted for. In all such cases, then, it would be manifestly improper to allow interest; for interest by statute, is allowed as damages for the unjust detention of money; and here these damages have been considered by the parties, in the extra price agreed on. But as it is not in the power of this court to discriminate between the cases where the order was drawn for services to which the law affixed a stipulated price, and where the county contracted with individuals upon such terms as could be agreed upon, it becomes the duty of the court to decide this question upon legal principles. It is, however, to be regretted, that the court, in their researches, have been able to find but one adjudged case that is in point. It is true, that some cases were referred to in the argument, as authorities, to show that in some of the States, interest had been allowed against the State. One of these cases was for money lent the State, on an express contract to pay interest; another was to recover from the State, on a breach of warranty contained in a deed, and was decided upon principles applicable to that description of cases. In the third case, the facts are too loosely stated, to furnish us with the reasons of the court for allowing interest; consequently, these authorities can have no application here. This dearth of analogous adjudged cases, renders it the duty

of the court, to apply such general principles to the case, as they shall deem apposite.

It is a principle of the common law, that the government, and by parity of reasoning, a county, cannot be guilty of laches. It is also well settled, that a State is not barred by a statute of limitations, unless expressly named. Interest is not given by the common law, for a failure to pay money when it is due, unless the parties have so agreed, and is only allowed by statute when the party neglects to pay at the time stipulated, and is then given, in the nature of a penalty for the violation of a contract. Apply these principles to the question under consideration. The law does not impute laches, or even improper conduct, to a State or county, and hence it will not presume that the county has not done everything within its power to enable itself to comply with its contracts and duties. Nor will the law inflict a penalty, or give damages, against a county for not paying its debts, when it is manifestly out of its power to do so. Counties are limited corporations, and can only levy a tax to a limited amount. When the law gives a penalty or damages against a corporation, or even against an individual, for the nonperformance of a given action or duty, it is done to stimulate and quicken the performance of a reasonable and possible thing. The law never gives a penalty, or even damages, for the nonperformance of impossibilities. Again, the statute of this State, which allows interest to creditors "for all moneys after they become due," does not by name include the State or counties. From this omission, is it not fairly inferable, that had the legislature intended to compel the State or counties to pay interest where they have not contracted to do so, that they would have been specially named? This inference is strongly supported by the fact that the legislature in 1819, passed a statute requiring interest to be paid on auditor's warrants. If auditor's warrants bore interest by the general statute regulating interest, this special act would have been unnecessary. The general practice of the community is also some evidence of what the law is on a given subject. Has interest, then, been generally allowed on county orders? We understand not. And it appears from the agreed cases, that on the orders received by the sheriff, of the people in payment of taxes, (which by the law he was compelled to put down in a tabular form, and to pay the identical orders so received, into the County Treasury,) the sheriff did not allow interest to the persons of whom he received them, nor did he claim it of the treasurer. Is not here strong evidence, not only of the understanding of the people that these orders did not bear interest, but an implied admission by the trea-

suror and sheriff, that the law did not allow it. If the law had allowed interest on these orders, it was the duty of the sheriff to have allowed it to the taxpayers. The only adjudged case, analogous to the present one, that is recollected by the court, is the case of *Beaird v. The Treasurer of this State*, decided at the June term of this court, 1825. In that case Beaird applied to the court for a mandamus to the treasurer, requiring him to pay interest on auditor's warrants, which motion was refused upon the principles above laid down, that the State was not bound to pay interest unless in cases where she had contracted to do so. From the best consideration that we have been able to give this subject, we can come to no other conclusion, than that a county is not bound to pay interest on county orders, in the absence of an express contract to pay it. The court, in coming to this conclusion, do not intend to controvert the position, as a general rule, that a party is bound, in conscience, to pay interest, whenever he withholds payment of a liquidated sum* of money, after it becomes due; but insist that the rule, for the reasons before given, does not apply to the State, or either of its counties. It might also with propriety be insisted, that the financial means of the respective counties to discharge their contracts, were or could have been known by those persons, who, either as officers or individuals, became creditors to the county. They may therefore be presumed to have consented to receive the payment of their claims, whenever the revenues of the county would enable it to pay its debts. If this is a reasonable presumption, and it seems to be, then the time of payment of these county orders did not arrive until there was money in the treasury to pay them; and provision is made by statute to pay orders according to their seniority.

The second question presented for our consideration, is whether Bartlett was justifiable in allowing to the sheriff the advance he did, on the equivalent orders? In order fully to understand the effect of the settlement made by these officers, I will take the first order mentioned in exhibit A, and made part of the agreed case. The order was issued at the June term, 1825, for \$16 50, equivalent to \$49 50; interest on the equivalent, \$14 10, making \$63 60. Here, then, is a county order, issued in June, 1825, for \$16 50, converted by this magical word "equivalent," within five years, to the sum of \$63 60. Can it for a moment be supposed that the Commissioners for the county of Madison contemplated binding their county to pay such an enormous advance on so small an amount? The very statement of the case is sufficient to show the absurdity of such a supposition; and even if they had made such a contract, it would have been so im-

Madison County v. Bartlett.

Ross v. Reddick.

provident an act on the part of the county, that a court of equity would have set it aside. But the County Court made no such contract as to justify the allowance made by the treasurer to the sheriff. The order simply means, that when it is presented for payment, if the treasurer is under the necessity of paying it in State paper, then he shall pay the State paper to the holder of the order, at the market price of State paper. It was optional with the county either to pay the \$16 50 in specie, or if the amount was paid in a depreciated currency, then that currency was to be paid at such a rate as to make it equivalent to specie. If A execute his note for one hundred State paper dollars, and he is sued on it, all that can be recovered is the value of one hundred State paper dollars when the note becomes due, and interest on that value till judgment. Such have been the uniform decisions of the Circuit Courts upon this subject, and the correctness of the decisions have never been questioned. That the real amount mentioned in these orders could only be recovered, seems so clear, that it would be a waste of time to consider the question any further.

The court, therefore, are of opinion that in the case of the people for the use of Madison county, they are entitled to have the judgment below reversed, and recover against Bartlett the sum of seven hundred and ninety dollars, with costs, and that the judgment in the case of *Madison County v. Bartlett*, be also reversed with costs, and that the causes be remanded to the Madison Circuit Court for judgment, according to the stipulations of the agreed cases.

Judgment reversed.

Cowles, Edwards and Prickett, for plaintiffs.

Simple for defendant.

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ROSS v. REDDICK.

1 SCAM. R., 73.

Error to Peoria.

1. COURTS will take judicial notice of the boundaries of counties.
2. The certificate of the register of the U. S. Land Office is, by statute, made evidence of a fact appearing upon the records of his office.
3. Where there are several pleas, upon one of which no issue is taken, and the parties go to trial without noticing the omission, this is a waiver of the irregularity.

Judgment affirmed.

McConnell, for plaintiff.

Bigelow, for defendant.

Christy v. McBride.

CHRISTY v. McBRIDE.

1 SCAM. R., 75.

Appeal from Randolph.

1. WHERE an administrator acts honestly and prudently, he will not be held responsible for a loss occasioned by his error of judgment.

2. *Quære*.—Is an administrator in Illinois, liable for the dishonesty of a collector in a sister State, who fails to pay over money collected, which was due and owing to the intestate, by a resident of such sister State?

*Judgment affirmed.**Breese and D. Blackwell*, for appellant.*D. J. Baker and Hall*, for appellee.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

DECEMBER TERM, 1833.

PRESENT :

WILLIAM WILSON, CHIEF JUSTICE.
THOMAS C. BROWNE,
SAMUEL D. LOCKWOOD, } ASSOCIATE JUSTICES.
THEOPHILUS W. SMITH, }

PANKEY *v.* THE PEOPLE.

1 Scam. R., 80.

Error to Johnson.

To constitute perjury, the indictes must have sworn falsely upon a point material to the issue, before a tribunal having legal authority to inquire into and determine upon the cause or matter to be investigated.

SMITH J.—This case comes before the court on a writ of error. The plaintiff in error was indicted, tried, and convicted on a charge of perjury, in the Circuit Court of Pope county. A new trial was afterward awarded, the *venue* in the case changed to Johnson county, where a second trial and conviction was had. The plaintiff in error, while the cause was pending in the Circuit Court of Pope, and before pleading to the indictment, interposed a motion to quash the indictment, which was overruled by the court; afterward a bill of exceptions to the decision of the Johnson Circuit Court was taken by consent of parties; and in which is embodied the evidence given in the cause on its trial in the Circuit Court of Johnson county.

The indictment avers, that at a regular term of the Circuit Court of Pope county, before the grand jurors, regularly empannelled and sworn to inquire in and for said county, a certain complaint was made by one Lewis Pankey, against one John W. Womack, for taking illegal fees as a constable, in order to found an indictment against said Womack as a constable of the said county, to be found

Pankey v. The People.

by said grand jury; and that the said Lewis Pankey, being of lawful age, and being first duly sworn by the foreman of the said jury, the said foreman having lawful authority to administer the oath in that behalf, on being interrogated of and concerning the taking and receiving of said illegal fees, and whether the services for which such fees were taken had been performed at the request, and by the consent of the said Lewis Pankey, he, the said Lewis, unlawfully and maliciously, intending to induce the jurors to find such bill of indictment against the said Womack, and to injure the said Womack, did falsely, knowingly, and corruptly, by his own act and consent, depose and give in evidence, among other things, before the said jurors, in substance and to the effect "that he, the said Lewis Pankey, did not agree nor give orders to the said Womack, constable as aforesaid, to summon a jury in his case with Daniel Vineyard, before that time tried, nor was it his, the said Lewis Pankey's, wish to have a jury to try it;" whereas in truth and in fact the said Lewis did agree and give orders to the said constable to summon a jury in his case with Daniel Vineyard, and was anxious and willing that his said case should be tried by a jury. It further avers, that the matter thus alleged to have been sworn to, was material to the point of inquiry in issue before the grand jury, in this, that if the said Lewis had not agreed or given orders to the said constable to summon such jury, then the said Womack was guilty of taking illegal fees from the said Lewis; but if he had given such orders and agreed that the said constable should summon a jury, then the said constable was not, and had not been guilty of taking such illegal fees.

It will be perceived from this recital of the averments in the indictment and assignment of the perjury, that two questions naturally present themselves as subjects of direct inquiry, and upon which the correctness of the decision of the Circuit Court, in refusing to quash the indictment, must necessarily depend. Those questions are, whether the grand jury had any legal authority to institute an inquiry and examination into the act of Womack, as a constable, for the taking of illegal fees, as a criminal and indictable offence; and the materiality of the testimony given by Pankey before the grand jury in relation to the inquiry with reference to the alleged taking of such illegal fees.

It will not be doubted that one of the essential ingredients necessary to constitute legal perjury, is, that the tribunal or the body before whom the false swearing is alleged to have been committed, must have legal authority and power to inquire into the cause or matter investigated. Apply this principle then to the case before us.

Pankey v. The People.

From whence could the authority of the grand jury be deduced to institute an inquiry into an officer's taking illegal fees for the service of process? It is not a criminal act, nor could an indictment be founded thereon, be the fact of taking illegal fees ever so clearly established. A remedy has been provided by the infliction of a penalty for such acts; but the modes of proceeding to enforce such penalty are entirely of a civil nature. How, then, could the grand jury have had jurisdiction over the subject matter of the inquiry? It is too evident to doubt that it was a subject of inquiry which they had neither the rightful authority to examine, nor upon which to found an indictment, let the facts ever so clearly establish the actual taking of illegal fees. But it will be also perceived by the second point, the assignment of the perjury is made to consist in falsely stating that Pankey had not agreed nor given orders to the constable, Womack, to summon a jury in his case with Daniel Vineyard, before that time tried, nor was it his, the said Pankey's, wish to have a jury.

In what manner could it possibly have been material for Pankey to have stated whether he had or had not given such orders to the constable, or whether he, Pankey, had or had not wished to have had a jury. If the inquiry in the case of Pankey with Vineyard, was a legal one before a justice of the peace, having a right to try the controversy, then the legality of a constable's fees could in no way depend upon a request to the constable to summon a jury—because it is the justice of the peace who alone determines the issuing of the *venire*, which is the authority for the constable to summon a jury. Could then this inquiry be a material one for the consideration of the grand jury, to enable them to determine whether the constable had or had not been guilty of taking illegal fees? The legality or illegality must alone depend on the fact, whether the justice had or had not given the officer authority to summon a jury, and whether or not such services had been rendered, and the fees charged and received. It is evident that the facts charged to have been sworn to before the grand jury, were in every particular immaterial to the inquiry, had it been a proper subject of investigation before it; and although they may have been entirely false, still it could not have been the commission of legal perjury, because of its *immateriality*.

If the court were to look into the bill of exceptions, in an examination of the correctness of the decision made on the motion to quash in the Circuit Court, which would be clearly improper, because that decision is to be alone tested by the position of the cause as it then stood, it would then perceive that the case with Vineyard was an

Pankey v. The People.

The People v. Miller.

arbitration about an alleged libel before a justice of the peace, who had not the slightest jurisdiction to examine into it; and that, consequently, the constable could have had no legal authority to summon a jury in the case, and might well, therefore, have been guilty of charging illegal fees, when the proceedings before the magistrate were wholly void.

As we are clearly of opinion that the Circuit Court erred in not quashing the indictment for the reasons stated, the judgment of the Circuit Court of Johnson county is reversed, and the prisoner is to be discharged.

Judgment reversed.

Gatewood, for plaintiff.

Sample, attorney-general, for defendants.



THE PEOPLE v. MILLER.

1 Scam. R., 85.

Error to Morgan.

1. A *devastavit* is unnecessary in order to sustain an action upon the bond of an executor or administrator.
2. By statute any one or more of the obligors in an administration or executor's bond may be sued.
3. Form of the assignment of breaches in an action of debt upon the bond of an executor.
4. Error upon a *pro forma* judgment.

THIS was an action of *covenant* commenced in the Morgan Circuit Court by the plaintiffs in error against the defendants in error upon an executor's bond.

The breaches assigned in the declaration, are as follows:

"And the said people say that the said William Miller has not paid the judgment aforesaid, or any part thereof, to the said William Lee D. Ewing, although often requested so to do; but has devastated and wasted the estate, goods, chattels, and effects of the said Benjamin P. Miller, deceased, of whom he, the said William, was executor as aforesaid.

"And the said people aver that the said William Miller (and the said Simms) have otherwise broken their covenants, and have not kept and performed the same in this, that the said William Miller did not return to the office of the Court of Probate of said county within three months after the date of his letters testamentary, a true and perfect inventory and valuation of the personal estate of the said Benjamin P. Miller, deceased, neither did the said William Miller return to the said office of the Court of Probate of said county, a true and perfect inventory of all moneys, judgments, bonds, promissory notes, and open accounts, or other evidences of debts of the said estate, neither

The People v. Miller.

has the said William Miller filed in the said probate office a true and perfect statement and list of titles to estates as well real as personal, equitable or legal, neither has the said William Miller exhibited to the Court of Probate and filed in the said office, any information or statement showing the kind, quantity, quality, or value of said real estate as by the laws of the land he, the said William, as executor, was bound to do; but he, the said William Miller, has received and taken possession of the real and personal estate of the said Benjamin P. Miller, deceased, and has sold and disposed of the real estate of the said estate of the said Benjamin P. Miller, deceased, and received and wasted the proceeds thereof, and has failed and refused to pay the said William Lee D. Ewing the amount of the judgment aforesaid, although often requested so to do.

“And the said people say, that the said defendants have not kept their covenants, but have broken the same in this—the said William Miller did not, as executor of the said Benjamin P. Miller, deceased, exhibit to the said Aaron Wilson, judge of the Court of Probate of said county, at the first term of the said Court of Probate which was in session after the expiration of one year from the date of his said letters testamentary, a true and perfect account of all his actings and doings as executor as aforesaid, and then and there proceed to settle the affairs and business of said estate, as by his bond and obligation aforesaid, and by the laws of the State of Illinois, he was bound to do; but although twelve months have long since expired since the appointment of the said William Miller as executor, and since the date of his said letters testamentary, yet he has not settled with the said Court of Probate, the business and affairs of said estate, or paid to the said William Lee D. Ewing the debt and judgment aforesaid, or any part thereof, although often requested so to do.

“And the said people of the State of Illinois, protesting that the said defendants, Miller and Simms, have not kept, fulfilled or performed anything in their said bond and obligation, or by the laws of the State as the said Miller was bound to do and perform, and that the said debt and judgment and costs in favor of the said Ewing, remained totally in arrear and unpaid to him, said Ewing, contrary to the tenor and effect, true intent and meaning of the said indenture and the laws of the State aforesaid, to wit, at the county and circuit aforesaid.

“And so the said people say, that the said William Miller and Ignatius R. Simms (although often requested so to do), have not kept their said covenants so by them made as aforesaid, but have broken the same, but to keep the same with the said people, have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage

The People v. Miller.

of the said people \$1,000, and therefore this suit is brought for the use of the said William Lee D. Ewing as aforesaid, to wit, at the county and circuit aforesaid.

“M. McCONNELL,

“Attorney for the People and Ewing.”

Judgment was given *pro formâ* for the defendants upon demurrer to the declaration, and the cause by agreement was brought into this court.

SMITH, J.—This case is submitted for the decision of this court, on a written agreement, the parties thereby waiving the service of process, and entering their appearance and filing a record of the cause. By an inspection of the record, it appears that it was an action of covenant on an executor's bond, against the defendants, in the Morgan Circuit Court, and that only two of the obligors in the bond have been sued. The declaration avers the appointment of Miller as executor, and that he took upon himself the burden of the administration and executorship of the testator; and that he, with the other defendant, and one Waller Jones, then and there made and entered into a bond which is in exact conformity with the form prescribed by the statute of the State, in such cases, and which is set out in *hæc verba*. It is then averred, that the defendants have not kept their covenants in the bond contained, but have broken the same, because the relator, Ewing, recovered, by default, a certain judgment against Miller, as executor, for the sum of \$834 in the Morgan Circuit Court, at the May term of said court, 1833, with costs of suit, to be levied of the goods and chattels of the testator, in the hands of the executor to be administered; upon which judgment an execution had been issued and returned *nulla bona*. The declaration then avers a nonpayment by defendant, Miller, of such judgment, and that he has wasted and devastated the estate, and goods, and chattels, and effects of the testator. It then assigns various breaches of the condition of the bond in not returning an inventory and valuation of the personal estate of the testator, and the not performing the general requirement of the obligations of the bond, and avers that the defendant, Miller, has sold and wasted the estate of the testator. It also alleges that no settlement of the estate has been made in the Court of Probate of Morgan county, although one year had elapsed from the date of the letters testamentary, as by law he was bound to have done; nor has any account of the actings and doings of the executor been presented to such court. To this declaration there was a general demurrer, and also an admission or agreement, that Waller Jones executed the bond with the other defendants, and that he was jointly bound with the

other defendants in the bond ; that he was still living, and that the defendants might take advantage of the nonjoinder of Jones upon the demurrer, as though a plea in abatement had been filed. At the request of the parties a judgment *pro formâ* was rendered, sustaining the demurrer.

On this statement of the case, two points seem to be presented for consideration.

1. Whether the declaration is substantially good ; and whether, under our laws, the action on the bond could be maintained for a breach of its conditions.

2. Can the action be sustained against two of the obligors only ?

On the first point it is not perceived why the declaration is not sufficient. It contains all the necessary recitals and averments, and the breaches seem to be well assigned.

The statute relative to wills and testaments, in force July, 1829, in the one hundred and thirty-second section, provides, "That whenever any executor or administrator shall fail to comply with the provisions of the act, or shall fail to comply with any or all the covenants in his bond, an action may be forthwith instituted and maintained on such bond against the principal or securities, or both ; and the failure aforesaid shall be a sufficient breach to authorize a recovery in the same manner, as though a *devastavit* had been previously established against such executor or administrator."

This section gives the action in cases of neglect or refusal to comply with either of the provisions of the law which controls and governs the conduct of the executor, as also, in cases where he shall violate any one or more of the covenants in the bond, and has dispensed with the proof of *devastavit*, according to the course of the common law.

Upon the second point, it appears only necessary to observe that the right to sue any one or more of the obligors in the name of the people, for the use of any person who may be injured by the neglect or improper conduct of the executor, is expressly given by the provisions of the sixty-fifth section of the same act. There can, then, be no irregularity or error, in not joining Jones, one of the obligors, and it could form no valid objection on demurrer, nor be cause of abatement. The statute has, in this particular, changed the common law rule as to the joinder of parties.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion. The plaintiffs in error recover their costs. *Judgment reversed.*

Davis and *McRoberts*, for plaintiffs.

W. Thomas, for defendant.

Linn v. State Bank.

LINN v. STATE BANK.

1 SCAM. R., 87.

Error to Jackson.

1. The decision of the Supreme Court of the United States, upon a point where they have exclusive power to hear and determine a matter of law is conclusive upon the State tribunals.
2. The notes of the old "State Bank" are "*bills of credit*" within the meaning of the Federal Constitution. The prior contrary decisions of this court upon this point are overruled.
3. A debtor of the State Bank, who made his promise in consideration of illegal currency, may successfully defend against the debt thus created.
4. The court apologizes for its original ignorance.

LOCKWOOD, J.—This is an action of *debt*, brought on a sealed note, executed by Wm. Linn to the plaintiffs below. The defendant in the court below, pleaded that the writing obligatory was sealed and delivered by him to the plaintiffs, for and in consideration of bills issued and emitted by the plaintiffs, under and by virtue of an act of the legislature of the State of Illinois, entitled "*An Act establishing the State Bank of Illinois*," and that the emitting and issuing said bills by said bank, under and by authority of said act, was a violation of the 10th Section of the 1st Article of the Constitution of the United States, which forbids a State to "emit bills of credit."

To these pleas the plaintiffs below demurred, and judgment was given in the Circuit Court in favor of the Bank. To reverse this judgment, the defendant below has brought a writ of error to this court. The main question presented by this case for the consideration of this court, is whether the act establishing the State Bank, so far as said act authorized the issuing of the bank bills which formed the consideration of the sealed note sued on, is a violation of the Constitution of the United States.

To support the position that the issuing the bank bills mentioned in the plea, is a violation of the Constitution of the United States, the counsel for the plaintiff in error cited the case decided in the Supreme Court of the United States, of *Craig et al. v. The State of Missouri*.

The court recognizes the correctness of the doctrine that the Supreme Court of the United States is the proper and constitutional forum to decide and finally to determine all suits where is drawn in question "the validity of a statute of, or an authority exercised under, any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such validity."

The decision of the demurrer in the court below necessarily drew in question the validity of the statute establishing the State Bank of Illinois; and that decision being in favor of its validity, brings this cause within the doctrine above acknowledged. And although the

question involved in this case is of immense importance to the people of this State, and affects interest of great magnitude, yet the duty that devolves on this court is a very plain one. It is simply to ascertain what the Supreme Court of the United States has decided in an analogous case, and then decide in accordance with the decision of that court. When the Supreme Court of the United States have decided that a State law violates the Constitution of the United States, the judges of the respective States have no right to overrule or impugn such decision. State judges are sworn to support the Constitution of the United States, and that instrument in its 6th Article declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land, and the judges in every State shall be bound thereby; anything in the constitution or laws of any State to the contrary notwithstanding."

As then this court is bound to conform its decisions on questions relative to the unconstitutionality of State laws, to the decisions of the supreme judicial tribunal of the nation, it becomes necessary to ascertain what that court has decided in the case of *Craig et al. v. The State of Missouri*. Chief Justice Marshall, who delivered the opinion of the majority of the court, investigates the questions "What is a bill of credit?" and "What did the Constitution mean to forbid?" in his usual lucid and forcible manner. He says that a bill of credit, "in its enlarged and perhaps literal sense, may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language denominated 'bills of credit.' To 'emit bills of credit,' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as, money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood. At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium, was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our Revolution we

were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and 'bills of credit' signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots—a mischief which was felt throughout the United States, and which deeply affected the interest and prosperity of all—the people declared in their Constitution that 'No State shall emit bills of credit.' If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium by a State government, for the purpose of common circulation.

"What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates signed by the auditor and treasurer of the State are to be issued by those officers to the amount of \$200,000, of denominations not exceeding \$10, nor less than 50 cents. The paper purports on its face to be receivable at the treasury or at any loan-office of the State of Missouri, in discharge of taxes or debts due to the State.

"The law makethem receivable in discharge of all taxes or debts due to the State, or any county or town therein, and of all salaries and fees of office, to all officers, civil and military, within the State; and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the State for their redemption. It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denomination of the bills, from \$10 to 50 cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation—that is, emitted by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character, and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed 'bills of credit,' instead of certificates, nothing would have been wanting to bring them within the prohibitory words of the Constitution.

"And can this make any real difference? Is the proposition to be

maintained, that the Constitution meant to prohibit names, and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely 'bills of credit,' as if they had been so denominated in the act itself.

"But it is contended that, though these certificates should be deemed 'bills of credit,' according to the common acceptance of the term, they are not so in the sense of the Constitution, because they are not made a legal tender.

"The Constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all 'bills of credit,' not to bills of a particular description. That tribunal must be bold, indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. The Constitution therefore considers the emission of 'bills of credit,' and the enactment of tender laws, as distinct operations, independent of each other, which may separately be performed. Both are forbidden. To sustain the one because it is not also the other; to say that 'bills of credit' may be emitted, if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

"The history of paper money has been referred to for the purpose of showing that its great mischief consists in being made a tender, and that therefore the general words of the Constitution may be restrained to a particular intent. Was it even true that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent, to which we are not conducted by the language of any part of the instrument. But we do think that the history of our country proves either that being made a tender in payment of debts is an essential quality of 'bills of credit,' or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition."

The Chief Justice, after giving several examples taken from the

history of the United States and several of its members, of issues of paper money, some of which were made a tender in payment of debts, and others not, and showing the evils that resulted to the country from their emission, and that the evils with which their emission was fraught did not depend upon their being made a legal tender, and contending that all these issues of paper money were alike "bills of credit," comes to the conclusion that the certificates issued by the loan office in Missouri were "bills of credit" in the sense of the Constitution, and consequently their emission was forbidden by that instrument. The Chief Justice then inquires, "Is the note executed by Craig valid, the consideration of which consisted in lending to him of these loan-office certificates?" He says, "It has been long settled that a promise made in consideration of an act forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now, the Constitution of the United States forbids a State to 'emit bills of credit.' The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan-offices; but the issuing of them, the putting them into circulation, which is the act of emission—the act that is forbidden in the Constitution. The consideration of this note is the emission of bills of credit by the State.

"The very act which constitutes the consideration is the act of emitting bills of credit in the mode prescribed by the law of Missouri, which act is prohibited by the Constitution of the United States." The Chief Justice, after citing a number of decisions to show that bonds and notes given on illegal considerations are void, says that "a majority of the court feel constrained to say that the consideration on which the note in this case (the case of *Craig v. the State of Missouri*) was given, is against the highest law of the land, and that the note itself is utterly void."

Having thus ascertained what the Supreme Court of the United States has decided in the case referred to, the question here arises: Is there such a difference between the certificates issued by the loan-offices in Missouri and the bills issued by the bank established in this State, as to exempt these bills from being considered "bills of credit" within the meaning of the Constitution of the United States?

A concise review of a few of the provisions of the "*Act establishing the State Bank of Illinois*" will show a very close and striking resemblance. The bank was to be owned by the State. The cashiers were to give bond with security for the use of the State, for the faithful discharge of the duties of their office. The bank was to issue

notes or bills to the amount of \$300,000, in bills not exceeding \$20, nor less than \$1, and their form is prescribed. They were to bear two per cent. interest, and to contain a promise to pay.

The bills thus to be issued were to be receivable at all times for debts due the State, or to any county, or to the bank. The \$200,000 of bills, as soon as they could be prepared for "Missouri," were to be loaned to citizens of the State, and the loans were to be made in the different counties according to population. All the revenues, lands, town lots, funds, and other property of the State were "pledged" for the redemption of the bills, and the legislature "pledged" themselves, at the expiration of ten years from the passage of the act, to redeem all the bills to be issued by virtue of the act, in gold and silver. The bank was also required to withdraw from circulation, annually, one-tenth part of the whole amount of the bills issued.

From this statement of the prominent features of the bank law, it clearly appears that our bank and the Missouri loan-office, although called by different names, were similar in their objects, and both were established for the purpose of emitting a paper currency to circulate as money in the respective States. The issuing of these bills is, according to the decision of the Supreme Court of the United States, emitting "bills of credit," and a violation of the Constitution of the United States. It is also to be remarked in relation to the act establishing our State Bank, that it is obnoxious to the charge of attempting to force the bills of the bank into circulation by staying creditors from collecting their debts for three years, unless they would receive these bills in payment.

It results from this review of the provisions of the bank law, that it contains objectionable features not found in the Missouri loan-office law; and there can be no doubt if this case were presented to the Supreme Court of the United States, that that court would decide that the bills issued by the State Bank of Illinois were "bills of credit," and that the sealed note on which this action was brought was given for an illegal consideration, and therefore null and void.

Such being the opinion of this court, we are compelled to say that the judgment of the Circuit Court must be reversed.

As the decision now given conflicts with the decision of this court in the case of *Snyder v. the President and Directors of the State Bank of Illinois*, it is proper to notice the circumstances under which that decision was made. This court there say, "That the debtors of the bank cannot raise the objection that the charter of the bank is a violation of the Constitution. After having borrowed the paper of the institution, both public policy and common honesty require that the

Linn v. State Bank.

Vermilion County v. Knight.

borrowers should repay it." It is therefore unnecessary to decide whether the incorporation of the bank was a violation of the Constitution or not. This decision was made in 1826, and before the decision in the Supreme Court of the United States, and under circumstances that did not afford this court an opportunity to investigate authorities to any extent. Similar decisions had been made in Missouri and Kentucky, and, it was understood, in other States. The error, therefore, which this court fell into in that case was, as far as the information of the court extended, a common one. A further apology might be offered for the error, in the consideration that after all the light that time and fuller investigation had shed upon the subject, one, at least, if not more, of the judges of the Supreme Court of the United States entertain the same opinion.

Judgment reversed.

Breese and Baker, for plaintiffs.

Semple, attorney-general, for defendant.

VERMILION COUNTY v. KNIGHT.

1 Scam. R., 97.

Appeal from Vermilion County.

1. Where a county, through its financial agents, employs a physician to render medical aid to a sick pauper, an action will lie in behalf of the physician to recover for his services.
2. If the commissioners of a county make a contract, and neglect to enter it of record, the agreement may be established by oral evidence.
3. Where the commissioners employ a physician to attend a sick person, it is not incumbent upon the latter to establish the fact that the patient was a pauper properly chargeable to the county.
4. Where the declaration in such a case contains two counts, one charging that "the commissioners of the county" employed the plaintiff, and the other, that the "county, by its commissioners," employed him—this does not constitute a misjoinder.
5. The commissioners, when acting as a court, can bind the county if the contract is within the legitimate sphere of their duties.
6. The county commissioners have no jurisdiction in civil cases.
7. The County Commissioners' Court is a court of record, but it does not necessarily follow that their acts must all appear of record to constitute a binding agreement upon the county.
8. A party to a contract has no power to determine the extent of its obligation.

SMITH, J.—The appellee instituted a suit in the Circuit Court of Vermilion county, against the appellant, and declared in *assumpsit*. The declaration contained three counts: the first alleges that the appellee, being a physician and surgeon, and exercising such profession, entered into a contract with the commissioners of said county, to employ his skill and art in his profession, upon the body of one Ludington, who then and there was treated and considered in the county by such commissioners, as a pauper, and was afflicted with

various diseases: with a condition thereto annexed, that unless the said pauper was benefited and relieved by his, the appellee's skill and medical aid, he was to receive no compensation; but if he was so benefited and relieved, the appellee was to receive a reasonable compensation. There is an averment that such skill and medical aid were exercised and rendered, and that the pauper was greatly relieved and benefited thereby, and that the appellee reasonably deserved to have, for such services, the sum of \$300.

The second count avers, that the said appellee was employed by the county, through its commissioners, to render his skill and attendance on the said pauper, so considered and treated as such by said commissioners, who was afflicted with disease; and that in consideration thereof, the said county became indebted to the said appellee in the sum of \$180, which it undertook and promised to pay.

The third count is a *quantum meruit*, for the like services rendered.

To these counts, the appellant pleaded, first, the general issue; and secondly, a special plea of exclusive original jurisdiction in the County Commissioners' Court of Vermilion county, to hear and determine what compensation the said appellee was entitled to for such services, by way of *bar* to the action: to which second plea there was a demurrer and joinder.

The Circuit Court sustained the demurrer to the second plea, and the issue on the first was tried, and a verdict rendered for the plaintiff. On the trial of the cause, the plaintiff offered *parol* evidence of the special contract entered into by the County Commissioners' Court of Vermilion county, the records of that court at which the contract was alleged to have been made, not showing any contract between the plaintiff and defendant. To the admission of this evidence, the counsel for the defendant objected, on the ground that the records of the County Commissioners' Court, or some writing duly authenticated, was the only admissible evidence to establish the contract to bind the county. The Circuit Court overruled the objection, and permitted the evidence to go to the jury; and also instructed the jury, that if the County Commissioners, acting as a court, did make the contract sued on, the county was bound, though the same did not appear on the record, or in any other writing under the seal of the court. It further appears, in the bill of exceptions, that the witnesses who proved the contract, were the commissioners who were in office at the time the contract was made, but were then (at the time of trial) out of office. The defendant excepted to the decisions of the court.

The errors assigned are—1st, That there is a misjoinder of parties

and counts; 2d, That the plaintiff should have averred specially in his declaration all those facts necessary to show that the person who received the medical aid was a pauper, and that the county had become legally chargeable with his support; 3d, That the demurrer to the second plea was improperly overruled; 4th, That the Circuit Court erred in admitting *parol* evidence of the acts of the Commissioners' Court; 5th, That the Circuit Court erroneously instructed the jury, that, if the commissioners, acting as a court, did make the contract sued on, the county was bound, though the same did not appear on the records, or in any other writing under the seal of the court.

The several grounds of error will be considered. The first, alleging a misjoinder of parties and counts, it may be proper to remark, is supposed to be based on the use of the terms "*the County Commissioners*," and "*the county, by its Commissioners*," in the several counts of the declaration; indeed, such is the ground assumed by the counsel in support of the errors. It is not perceived how this can be said to be a misjoinder of parties and counts; the cause of action set out in each is clearly the same, though charged in different ways. The right of action is in the same plaintiff, and against the same defendant; for although, out of abundant caution, the pleader may have charged the contract to have been made, in one count by the county commissioners, and in another by the county through its commissioners, still, it is substantially the same thing; for whether the county, by its commissioners, or the county, by its own name, be charged with the contract, the liability is the same.

The constitution, indeed, expressly names them Commissioners, and through all the legislative acts, when spoken of, the term County Commissioners is used as frequently as "County Commissioners' Court." They are known by law as a public corporation, created for the purpose of superintending the business of the county in relation to its fiscal and local concerns; and although an act of the legislature directs that suits shall be carried on against the county by its particular name, still the commissioners are its public, acknowledged, lawful agents, to manage all its interests. The objection, then, that the plaintiff has joined different parties or causes of action, in right of different parties in the declaration, is not made out.

The second ground, the want of the special averments, is not well taken. The county commissioners were, by law, at the time of the making of the alleged contract, specially charged with the care and superintendence of all paupers in their county; and when they had adjudged that a person was entitled to relief, and employed an ir

vidual to afford the aid required, as between the county and the person so employed, it was conclusive and final on the county. The person employed was not by any means bound to inquire into the correctness of their determination; it was sufficient that they had authority to afford the relief, and when they had determined that it was proper, the county was bound by their contract, they having the authority to make it.

This is not the case of an action on an implied request, where the services had been rendered to one having gained a legal settlement, and who, in consequence of such settlement, would be entitled to such relief, and with the expense of which the county would be chargeable. In such a case, it will not be doubted, that to entitle a party to recover, it would be necessary to aver and prove all the facts necessary to show that the party to whom the relief was extended, was a pauper, whom the county was legally bound to support and take care of.

On the three last points, it may be proper to notice, that as they are in some measure connected, they may with propriety be considered together.

Before entering on the question of the propriety of the admission of parol evidence, the grounds arising on the demurrer may be disposed of. The appellant contends that the County Commissioners' Court had exclusive original jurisdiction to determine what sum was due for the services rendered, and that, therefore, the Circuit Court had no power to inquire into the cause of action to obviate this objection, we need only recur to the constitution of the State, which, in creating the office of County Commissioner, declares that the "*time of service, power, and duties, shall be regulated and defined by law*;" and that the object of its creation is expressly "*for the purpose of transacting county business.*" Here, then, no power was given to adjudicate on contracts, and more particularly so where the county itself was one of the contracting parties. But if a doubt could remain, that no such grant was ever given by the constitution, it is removed by a recurrence to the powers and duties as prescribed by legislative enactment, which show, at once, the sense in which the legislative power understood that part of the constitution which created the office.—By the 9th section of the act establishing the Court of County Commissioners, passed 22d March, 1819, it is provided, "That there shall be nothing contained or construed in this act, to give the said court any original or appellate jurisdiction in civil or criminal suits or actions wherein the State is party, or any individuals, bodies politic or corporate, are parties." This provision

at once excludes all idea of jurisdiction in the case before the Court. The demurrer was, therefore, correctly decided.

In the consideration which might be given to the admission of the parol testimony, on the supposition that it conflicts with settled rules of evidence in regard to record, or the written evidence of courts of record, it will be perceived that a long and perhaps uninteresting examination of powers and duties of the County Commissioner's Court, as they have been practically understood, might be made; but how far that might tend to elucidate the accuracy of the decision, is not perceived; nor, indeed, could it be profitable or necessary to investigate the questions, whether this court is, in the legal sense of the term, a court of record; and whether it is marked by those constituent features which properly characterized a court of record, under the well known terms of *actor, reus, judex*.

It is by no means essential to a correct determination of the question arising on the admission of the evidence, or of the instructions of the court, that it should be determined whether the County Commissioner's Court was or was not a court of record, or a public corporation with specified and defined powers; because, while it is distinctly admitted that they could enter into no contract which could bind the county, except while sitting as a court or corporation, it does not necessarily follow that the evidence of that contract must at all events be proved by a record of the fact upon their minutes. It is true, under the general rules of evidence, that the highest evidence of which the fact is susceptible, and within the power of the party to produce, should be adduced; but then there are exceptions to all general rules, and they arise from the very necessity of the particular cases. Now, shall it be pretended, that in this case the plaintiff should have been held to the production of the record of a fact of which it is admitted there was no written evidence whatever, and which the defendant in the action had been the very cause of preventing from being made? The county commissioners, when the contract was made, either through design, accident, or ignorance, did not cause a record or minute of the contract to be made; and hence it is seriously contended that the plaintiff could not recover, because he does not adduce that which does not exist, and which, being an act he could not do himself, he could neither control or prevent from being omitted to be done. To have excluded parol evidence, under such circumstances would have been an act of great injustice—the means of defeating a recovery, by the defendant's own wrong. The contract was made—it was the duty of the county commissioners to have reduced the contract to writing—but,

Vermilion County v. Knight.

Woods v. Hynes.

because they have omitted their duty, is the defendant to take advantage of this misfeasance or nonfeasance of its own agents? To do this, would be to make the rule of evidence subservient to the purpose of injustice. No rule of evidence is better settled, than that a party may give parol evidence of a writing, if it be destroyed or lost. And why is it so? Is it not because it is beyond the ability of the party to produce it? Does not, then, the reason of the rule apply with equal, if not greater force here? It surely must. Suppose, in this case, a record of the contract had been made, and by accident the book containing it had been lost or destroyed, would it be denied that parol evidence might be given? Was the engagement of the commissioners to pay for the services, less a contract, because they did not do their duty, and cause it to be entered on record? Certainly not. But the case shows that the identical individuals who, as commissioners, made the contract, are the witnesses by whom it was established; and there could have been no danger that they could not declare accurately what that engagement was. It is, however, urged, that a *mandamus* would have been the proper remedy to have been resorted to in the first instance, to get the record evidence, and by which to compel the county commissioners to have put it on the records. And would not parol proof here, also, have been resorted to, to establish what that instrument was, which the commissioners would be called on to record? But it will be perceived that those who made the contract, were out of office, and that, consequently, their evidence would have to be used to establish the contract. It is then clear that the evidence was properly admitted.

This reasoning is directly applicable to the charge of the court, and equally sustains its correctness. The contract was made as a court, but, from the necessity of the case, parol evidence was only let in to establish what the record of the court could not, because the contract was improperly omitted to be entered on the record, as the law certainly intended it should have been.

McRoberts, for appellant.

Judgment affirmed.

Pearson, for appellee.

WOODS v. HYNES.

1 SCAM. R., 103.

Error to Adams.

1. The consideration of a note cannot be impeached in the hands of a *bonâ fide* holder, who acquired title prior to the maturity of the promise, under ordinary circumstances.
2. But if the note was obtained by "fraud or circumvention," it is absolutely void to all intents and purposes, and between every party to it.

Woods v. Hynes.

3. The fraud or circumvention, under our statute, however, does not relate to the *consideration* of the contract itself, but to the *mode* in which the note was obtained.
4. The Supreme Court will render a judgment *non obstante*, etc., notwithstanding the point was not directly made in the inferior court.
5. In such cases, the fact that the party, by subsequent pleadings, waived his demurrer to a special plea, will not be regarded by the appellate court.
6. The Supreme Court will, even as a court of law, render such judgment as the inferior court ought to have rendered, and compute the damages without a jury.

DEBT on note, made by the defendant to David Wilkin, and assigned under the statute to the plaintiffs *before* the maturity thereof. The defendant pleaded thus:

“And the said Peter Hynes comes and defends the wrong and injury, when and where, etc., and for plea says, that the said plaintiff (*actio non*) because he says that the said David Wilkin, the person to whom the said writing obligatory was made, used fraud and circumvention in obtaining the said writing from this defendant—that the said Wilkin, being a stranger in this country, came to the town of Quincy with a quantity of goods boxed up in boxes and crates—that the said Wilkin, in order to practise fraud and circumvention in the sale of the said goods with advantage and benefit to himself, represented himself, in the town of Quincy, to be a religious man and a member of the Presbyterian Church, in consequence whereof this defendant believed the said Wilkin to be an honest man, who would take no advantage, and use no deception in a trade—that the said writing was executed by this defendant to the said Wilkin, in consideration of the sale of the said goods from the said Wilkin to this defendant. That at the time of the sale of the said goods, and of the execution of said note, the said Wilkin, notwithstanding all his said pretences to religion and sanctity, did falsely and fraudulently, and with an intention to deceive and circumvent this defendant, represent to this defendant, that the said goods, so boxed and crated up as aforesaid, were of a good quality, and that they were equal in quantity to be of value to the amount of said writing. Yet this defendant in fact says that the said goods were greatly and scandalously inferior in quality to what they were represented to be by the said Wilkin, and were greatly and scandalously deficient in quantity to what they were represented to be by the said Wilkin, so that they were in nowise of value to the amount of the said note; and the said defendant says that so soon as he ascertained the aforesaid deficiencies in the said goods, this defendant tendered the said goods back to the said Wilkin, but the said Wilkin refused to receive the same, all which this defendant is ready to verify, wherefore he prays judgment, etc.”

The plaintiff filed a general demurrer, which the court below overruled. The report then states, that the plaintiff took issue upon the plea,

that a trial was had, and a verdict and judgment rendered for the defendant.

It will be perceived that the Supreme Court did not try the case upon technicalities, because the replication and similiter constituted a waiver of the demurrer. And if the plea was bad, as was finally decided, the plaintiff was entitled to a judgment *non obstante veredicto* in the court below.

SMITH, J.—It will be apparent that the plea would have been no bar to the action on the note in the hands of an innocent indorsee or assignee, as has been repeatedly adjudged; nor has the 6th section of the act of the General Assembly of this State, given the right to interpose such a defence where there is a mere deficiency in the quality or quantity of the article sold, as between the maker and the assignee. It declares that, “if any fraud or circumvention be used in obtaining the making or executing any instrument,” the note shall be void not only between the maker and payee, but also in the hands of every subsequent holder.

The present case does not come within this provision; the fraud, as attempted to be charged, consists in the contract itself, and not in the obtaining the making of the note. If a person represent a note to contain a particular sum, when, in truth, the amount is much greater, here would be a case contemplated by the statute; the note would be void not only between the maker and the payee, but also in the hands of every subsequent holder. That, however, is not the case here, for the plea admits a consideration, but denies a consideration to the extent of the face of the note, because of a deficiency in the quantity and quality of the articles sold, which it alleges were represented to be of full value. It will not be denied that the plaintiff was entitled to recover the value of the goods, even if he had stood in the place of the original payee, but being an innocent holder before the note became due, it is most clear that the matters of the plea would be no legal defence to the action. The issue, then, was a wholly immaterial one, and the verdict, on that ground, ought to be set aside. The Circuit Court ought to have sustained the demurrer; but it will be seen from the pleadings in the cause, when the demurrer to the plea was overruled, the plaintiff replied, and took issue on the plea. The question on the demurrer might probably not now be regularly before the court for its decision, yet as the issue tried was one wholly immaterial to the question before the Circuit Court, this court is bound to reverse the judgment, and to render a judgment for the plaintiff, notwithstanding the verdict of the court below. The rule is, that when

Woods v. Hynes.

State Bank v. Brown.

Crocker v. Goodsell.

the matter, be it never so well pleaded, could signify nothing, judgment may, in such cases, be given as by confession.

The clerk of this court will assess the damages on the note, which is the interest, and render a judgment for the debt and damages so computed, with the costs of this court, and the Circuit Court of Adams county.

Judgment reversed, with costs, and the proper judgment entered in Supreme Court.

A. Williams, for plaintiff.

Whitney, for defendant.



STATE BANK v. BROWN.

1 SCAM. R., 106.

Error to Clinton.

1. A DEBT due to the bank, is payable to the State.
2. The State is not affected by the *laches*, defaults, or misfeasances of her agents. (a)
3. The State is not bound by the statutes of limitation.

Judgment reversed.

Semple, attorney-general, for plaintiff.

Snyder and Thomas, for defendants.

(a) S. P. Madison County v. Bartlett, 1 SCAM. R., 67.



CROCKER v. GOODSSELL.

1 SCAM. R., 107.

Error to Adams.

1. The defendants agreed to erect a saw-mill for the plaintiff, and the latter agreed to pay the former \$150 within four months after the mill should be completed. *Held*, that the defendants could not recover until the expiration of the time specified in the contract, though prevented from performing by the act of the plaintiff.
2. The construction of a written contract is a question of law.
3. A very imperfect bill of exceptions acted upon by the Supreme Court.

THIS was an action of *assumpsit* upon the following contract:

“This article of agreement made and entered into this seventh day of May, in the year of our Lord one thousand eight hundred and thirty, between Thomas Crocker of the first part, and Herman Goodsell and Luke Keyes of the second part, all of Adams county, and State of Illinois, witnesseth: That the party of the first part doth agree to pay the said party of the second part one hundred and fifty

Crocker v. Goodsell.

dollars, when the said party of the second part do complete a saw-mill in a workmanlike manner for the said party of the first part; and the said party of the first part doth agree to pay the said party of the second part the sum of one hundred and fifty dollars, in four months after the mill shall be completed; and the said party of the first part doth agree to board the said party of the second part, and *find them a reasonable quantity of liquor*, and to haul the timber to the place, and to find all necessary irons for the said mill as fast as the said party of the first part can conveniently, and the said party of the first part doth agree to clean out a suitable place for said mill. And the said party of the second part do agree to put in a forebay, and the said party of the first part is to find plank for that purpose.

“(Signed),

THOMAS CROCKER,
H. GOODSSELL,
LUKE KEYES.”

The declaration averred a prevention of performance by reason of the neglect of the plaintiff to furnish the plank for the *forebay*. There was no *quantum meruit* count.

The bill of exceptions was thus: “Be it remembered that on the trial of this cause, after the evidence had been concluded both on the part of the plaintiffs and defendant, the defendant’s counsel moved the court to instruct the jury, ‘That the completion of the mill and forebay is a condition precedent, and if the plaintiffs have failed to prove the performance of said work, they cannot recover the specific price agreed to be paid by said contract for the said services. And if they are entitled to recover at all, they cannot recover the last payment until four months from the time the plaintiffs did the last work on the said mill;’ which instruction the court refused to give, and decided that that part of the instruction asked for in relation to the completion of the mill and forebay, and its being a condition precedent, was a matter for the consideration of the jury; and that an absolute performance, in point of fact, would not be necessary to be proved, provided an offer had been made by the plaintiffs to perform the work, and the defendant, by his conduct, had prevented their doing it. The defendant’s counsel further moved the court to instruct the jury, ‘That if the said plaintiffs were entitled to recover from the said defendant the said specific price, without completing the work for which it was to be paid, their right to sue for the last payment in said agreement mentioned did not accrue until four months after they, the said plaintiffs, did the last work on said mill, in pursuance of the said contract,’ which instruction the court also refused to give; to

Crocker v. Goodsell.

Bailey v. Campbell.

which said several opinions of the court the said defendant, by his counsel, excepts, and prays that this his bill of exceptions may be signed, sealed, and made a part of the record."

BROWNE, J.—It is very clear that the court below erred in refusing to give the instructions called for by the defendant's counsel. By the contract, most assuredly the performance of the work was a condition precedent, and the plaintiffs below bound themselves to wait four months after the completion of the mill, and this they did not do.

Judgment reversed.

A. Williams, for plaintiff.

J. W. Whitney, for defendant.

BAILEY v. CAMPBELL.

1 SCAM R., 110.

Error to La Salle.

1. To entitle a plaintiff to recover at *common law* in an action of *debt* for the use and occupation of land, he must aver and prove that the defendant entered in privily with his title, or that the relation of landlord and tenant existed between them.
2. Under the statute (a) the plaintiff must aver and prove that he was the "OWNER" of the land, and that the defendant was his express or implied tenant.
3. An instruction which uses the identical language of the statute is legal and proper; if the statute is itself *ambiguous*, it is the duty of the party complaining to ask for an *explanatory* instruction adapted to the facts of the case.
4. A tenant is estopped from denying the validity of his landlord's title.
5. If one purchases the land itself, or a claim of title to the improvement thereon, from a tenant of the owner of either, with a knowledge of the fact, he will be liable in an action for rent; if he has no such knowledge, the action is not justifiable.
6. A judgment for costs against an administrator is not proper in an action where he is unsuccessful.
7. A judgment may be affirmed in part, and reversed in part.
8. The Supreme Court will render a proper judgment where the record points out the line of duty.
9. Where a judgment is partially reversed, and in part affirmed, the cost will be divided between the parties.

BAILEY, *previous* to the year 1829, made and was the reputed owner of certain improvements upon the public lands, which constituted his farm and homestead, as far as a *squatter's* right could be legally available; afterward he sold his *claim* to Benedict, who leased the improvements to Bartholomew, and the latter assigned his lease to McKernan, who bargained and sold the improvement itself to the defendant Campbell, and Campbell occupied the premises during the years 1829, 1830, and 1831. Benedict died, and Bailey, his vendor, became his administrator, and sued the defendant in *debt* for use and occupation under the statute, as the tenant of his intestate. The cause was tried by jury, and the defendant obtained a verdict and judg-

ment. The plaintiff sued out, and prosecuted a writ of error. In the inferior court the defendant asked this instruction, which was given: "That the plaintiff or his intestate must have been the owner of the land, or that there must have been an express contract on the part of the defendant to pay rent, in order to entitle the plaintiff to recover."

The judgment for costs was against the plaintiff in his personal, and not in his representative character.

Lockwood, J.—Was the instruction wrong? If it is intended to support this action under the "*Act concerning Landlords and Tenants*," the instruction being in the language of the statute, was right. If the word "owner," as used in the statute, is ambiguous, it was the duty of the plaintiff to have asked for such explanation of the term as he deemed necessary; not having asked for any explanation, it is too late to complain in this court. Do the facts render the instruction wrong at common law? In order to maintain an action at common law for use and occupation, it is necessary to prove either that the defendant entered the premises by permission of the plaintiff, or that the actual relation of landlord and tenant existed. In this cause we must understand from the case that the improvements were sold to the defendant, and that he purchased in the expectation of becoming the absolute owner of the improvements, and not the tenant of any person. Will the law presume that improvements purchased in this manner created the relation of landlord and tenant, and imply that the entrance of the defendant was by permission of the plaintiff? We think not; for such presumption would entirely contradict the facts of the case. If the proof had established the fact that the defendant knew, when he purchased the improvements in question, that the seller was a tenant, there can be no doubt that, under such a state of the case, the law would have raised every necessary presumption to prevent the defendant from availing himself of his own want of good faith to defeat the action. The court, therefore, is clearly of opinion that the facts of this case would not have justified the court in charging the jury that the plaintiff was entitled to recover without proving either an express contract to pay rent, or an admission on the part of the defendant that he held as tenant of the plaintiff. In arriving at this result, the court does not intend to deny the doctrine that "a tenant is not permitted to dispute his landlord's title, whether such tenant be the original lessee or his assignee;" for, in our opinion, the facts do not warrant the idea that any such relations existed: nor do we intend to controvert the position that "a purchaser cannot ob-

Bailey v. Campbell.

Carson v. Clark.

tain a better title than his vendor had." This doctrine, however, could not in this case raise either an express or implied promise on the part of the defendant to pay rent.

Although the court does not perceive any error in the charge of the judge, yet, as the judgment is given for costs, it must be reversed. The suit was brought by an administrator in the right of his intestate. In such a case the statute "*Concerning Costs*" does not give costs against the plaintiff.

For this error the judgment must be reversed, so far as giving costs is concerned, and affirmed in other respects. The costs of this court are divided between the parties.

Judgment reversed and affirmed.

Bigelow, for plaintiff.

Ford and *Davis*, for defendants.

(a) Cooke's Stat., 716, sec. 1.

CARSON v. CLARK.

1 Scam. R., 113.

Appeal from Sangamon.

1. A suit before a justice of the peace, which is dismissed upon a compromise, is no bar to another suit upon a different cause of action, which might have been joined.
2. A person who enters upon government land, and makes improvements thereon, without a design to purchase, or who fails to comply with the terms of sale prescribed by the government, is a trespasser; and if another purchases the land, and then promises to pay the trespasser for his improvements, such promise is void. (a)
3. A moral obligation, coupled with an express promise to pay money, will not bind a stranger to the consideration.
4. A cause where the evidence was demurred to.
5. The question of consideration executed and executory, and moral obligations as the basis of such consideration, discussed.

THIS cause originated in the court of a justice of the peace, and was from thence appealed to the Circuit Court. On the trial of the appeal these facts appeared. Clark was a *squatter* upon a piece of public land. Carson purchased the land from the Federal Government; and promised afterward to pay Clark for improvements made upon the land by Clark, while the title to the land was in the government. Prior to the institution of this suit, Clark commenced a suit, before another justice, against Carson for another demand, and neglected to join the present cause of action. This latter cause was not tried, but compromised and dismissed. This was the state of the evidence, to which Carson *demurred*, upon which Clark had judgment in the Circuit Court, and Carson appealed to the Supreme Court.

WILSON, C. J.—The first error assigned to reverse this decision, is, that the first suit commenced by the plaintiff, is a bar to this action. To support this assignment of error, it must appear that the first suit was tried; otherwise it would not be a bar to a subsequent action; and it must also be shown that the demands were of such a nature that they might be consolidated into one action. Neither of these points are made out by the evidence; and as the defendant holds the affirmative of the issue as to this ground of defence, it was incumbent upon him to make them out. The suit was dismissed without trial, and there is no evidence as to the extent of the demands in either suit. The court cannot supply this defect, and by implication impose upon the party a forfeiture of his claim, or take from him the right of prosecuting it in the ordinary way.

The second assignment of error presents this question: Was the promise of the defendant founded on a sufficient consideration? or, Was it not made without any such consideration, and therefore void?

To constitute a valid contract, it must be made by parties competent to contract, and be founded on a sufficient consideration. If the consideration for the promise be past and executed, it can then be enforced only upon the ground that the consideration or service was rendered at the request of the party promising. This request must be averred and proved, or the moral obligation under which the party was placed, and the beneficial nature of the service, must be of such a character that it will necessarily be implied: as a promise by a master to pay his servant for past services. Here the inference is strong that the service was rendered at his request.

Or if a debt is due in conscience, a promise to pay will be binding: as where a father promised to pay for the maintenance of a bastard child. So, too, a promise founded upon an antecedent legal obligation will be valid, as a promise to pay a debt barred by the statute of limitations. Here the legal obligation is voidable, but the moral duty remains unimpaired, and constitutes a good consideration. Test the present case by the broad principle to be deduced from the examples cited, and where will be found any legal or moral obligation on the part of the defendant to constitute a sufficient consideration for his promise? The plaintiff entered upon and improved the land of the government. The motive by which he was actuated in doing so, was entirely selfish, and the act itself unauthorized by law. The defendant was at the time a stranger to the transaction; he had no interest in the land, and was no more benefited, nor, for aught that appears, more likely to be benefited by it, than any other person. A request

then cannot be inferred in the absence of all motive, and the request must be made, or the circumstances from which it is to be implied must exist prior to, or be concurrent with, the act which constitutes the consideration. Whatever benefit might accrue to the plaintiff by reason of the improvements upon the land he acquired by purchase from the government, he did not receive from the defendant, by virtue of his promise, either title or possession. The land, with the improvements thereon, passed to him by the sale from the government. His promise, then, to pay for that for which he had already paid, and to which he had received a perfect title, was without any consideration.

If there is a moral obligation on the part of any one to make compensation to the plaintiff for the value of his improvements, it is on the part of the government, and under this view of the case it is contended, that the defendant, as alienee of the land, incurred all the obligation and liability of the government, his alienor. But there is no principle upon which this position can be maintained. It is true, there are some covenants which run with the land; but between such and the promise here set up, there is not one point of analogy. A purchaser from the government has not entailed upon him other or greater incumbrances or liability, than he would be subject to in purchasing from an individual. Suppose, then, that in the present case the improvements had been made at the special instance and request of the alienor. This would have imposed upon him a legal obligation to make an adequate compensation; but surely his alienee would incur no such obligation. If then this legal liability would not be imposed by a transfer of the land, it follows conclusively, that a moral duty which is regarded, both in law and ethics, as entirely personal, would not flow from it. If, however, it should be considered that the defendant was under the same obligation as his alienor, would it, when coupled with his subsequent promise, impose upon him a legal obligation?

To determine this question, it is necessary to inquire whether there are any acts on the part of the government, from which a request to enter upon and occupy the public land is to be implied; or whether the act itself can be regarded as meritorious. As to the first branch of the inquiry, it is said that the preëmption laws which have been passed from time to time, amount to a license and invitation to enter upon and occupy the land of the government. There would be much force in this reasoning, if these acts, granting a prior right of purchase to the occupant, were all the legislation relative to the public lands. But they are not. Whatever presumption they may afford in favor

of a license by the government, is met and rebutted by the fact that there is a general law of Congress, which has been in force since the year 1807, forbidding, under severe penalties, all intrusion upon the public lands. And I understand, that in pursuance of the instructions of the Commissioner of the General Land Office, this law has been enforced in numerous instances. These preëmption laws, then, can be regarded in no other light than as acts of grace, exempting such as at the time come within their provisions, from penalties which they had previously incurred—but not as repealing or abrogating the general prohibition. If, then, there is no license to settle upon the public lands, but on the contrary it is forbidden, can the act of doing so be considered meritorious, or of that beneficial nature which would impose a moral duty on the government? It is not every benefit that may result to one, from the act of another, that will create this duty either in morality or conscience. The nature of the benefit, the manner in which it is conferred, or the motive which induced it, may be repugnant to the feelings and wishes of the person who is benefited thereby. And no principle of law will sanction the idea that a moral obligation can be imposed upon another against his will. All the circumstances of the transaction must be of such a nature as to presuppose a request, otherwise it will not be a good consideration for a promise. The case cited, where one man shot another, with the intention of killing him—but so far from succeeding in his design, the wound cured him of the dropsy, with which he was at the time afflicted—is an illustration of the principle that a benefit may be conferred without creating a moral or legal obligation to pay for it.

Under every aspect of the case, I am of opinion that the promise of the defendant below, was not founded on any legal or moral obligation, which is recognized as constituting a sufficient consideration for such a promise.

LOCKWOOD, J., *dissented*.

Judgment reversed.

Seiple, for plaintiff.

Logan, for defendant.

(a) *Roberts v. Garen*, 1 Scam. R., 396; *Hutson v. Overturf*, *ibid.*, 170; *Townsend v. Briggs*, *ibid.*, 472; *Johnson v. Moulton*, *ibid.*, 532. This rule has been changed by statute. Cooke's Stat., 293-4. Decision thereon, *Taylor v. Davidson*, 11 Ill. R., 12.

CLARK v. THE PEOPLE.

1 SCAM. R., 117.

Error to Hamilton.

1. THE right of a defendant to a change of venue in a criminal cause, is a constitutional and statutory one, not dependent upon the discretion of the court, but solely upon the fact, that the defendant has in his petition conformed to the requirements of the law.

2. One of several indictees is entitled to a change of venue, notwithstanding any supposed inconveniences occasioned thereby.

3. Where several persons join in the commission of a criminal offence, and the nature of the crime will admit of it, it is the preferable course for the prosecuting officer to draft separate indictments.

4. Where, under a statute, defining and punishing the crime of *arson*, a fine is imposed, upon conviction, equal in value to the property burned, the indictment must aver what that value was.

5. Where a criminal conviction is reversed, because of the insufficiency of the indictment, the prisoner will be discharged from custody, and the cause will not ordinarily be remanded to the inferior court.

Judgment reversed, and prisoner discharged.

Scates, for plaintiff.

Semple, Attorney General, for defendants.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1834, AT VANDALIA.

MITCHELTREE v. SPARKS.

1 Scam. R., 122.

Appeal from Schuyler.

THE Supreme Court will, at a *subsequent term*, amend their record, in matters of form, *ex. gr.*, changing the Christian name of the appellee, where it is evidently a *clerical* mistake, and there is something to amend by.

Order accordingly.

THE PEOPLE v. LAMBORN.

1 Scam. R., 123.

Rule to show cause why the respondent should not be stricken from the roll of Attorneys for mal-conduct in his office.

1. The office and duties of attorneys discussed.
2. An attorney has no power to confess a judgment, when retained to defend the rights of his client.
3. Nor can he alter process after its delivery and before its execution.
4. To induce the Supreme Court to sustain a motion to strike an attorney's name from the rolls, it is not sufficient simply to show that the attorney has been guilty of *illegal acts*, but the court must be satisfied that the motive of the attorney was *corrupt*.

The People v. Lamborn.

5. Where the application is not made in such a cause by the injured party, but by a stranger, the affidavit in support of the charges must be *positively* stated, and not merely upon *information and belief*.
6. The practice of soliciting business by an attorney censured by the Supreme Court.
7. The respondent in this application, *though acquitted*, because no corrupt motive was established, was yet censured for his illegal and unprofessional acts.

THE facts were, that Julius C. Wright, the relator, filed an affidavit in the nature of an information, in this court, against the defendant, containing five distinct charges of mal-conduct in office, as an attorney and counsellor at law.

The first alleged that one Benjamin Green recovered a judgment before a justice of the peace, of Morgan county, against the relator, and that by the advice of Lamborn, he appealed said cause to the Circuit Court, and employed him to conduct his defence. That Lamborn, so far from complying with his duty as attorney for Wright, "corruptly agreed with one Washington Weeks (the person who claimed the right and ownership of said judgment) and without the knowledge or consent of the said Wright, but for the purpose of obtaining a compromise of other matters with the said Weeks, in which the said Lamborn was interested, but in which the said Wright had no interest," etc. etc., that "the said judgment of said justice of the peace should be affirmed."

The second charged the defendant with deserting his client after having received a retainer, and going over to his client's adversary, and assisting him to defraud his client.

The third was for altering the date of an execution from the 26th day of June, to the 26th day of July; and agreeing with the defendant, for his own gain, to delay the collection of his client's debt, upon the defendant in the execution paying him twenty-five per centum per annum interest on the amount of the execution, so long as he delayed its collection; and for delaying the collection of the execution for several months.

The fourth charged that the defendant was employed and fully paid by one Catlin, to defend a suit for him, and that after being so paid, he "went to the plaintiffs in said suit, and tendered them his services as attorney to prosecute said suit against said Catlin for them, stating to the said plaintiffs, that as he had been employed by said Catlin, he knew all the secrets of his defence, and was better able thereby to defeat the same."

The fifth charged that said defendant after being employed as an attorney by one Berry, deserted his client, and, without his knowledge, went over to his opponents, and conducted the cause for them.

The relator stated in his affidavit, that he knew nothing of any of the charges, of his own knowledge, except the first, but that he

The People v. Lamborn.

learned them from the information of others, and he believed the same to be true.

The defendant appeared in court, in person, and by counsel, waived the issuing of process against him, and pleaded not guilty.

WILSON, C. J.—The office of an attorney and counsellor at law, is one of great responsibility. To the lawyer is confided the cause of his client, and in the issue of that cause may be involved property, life, liberty, and character. It results, then, from the magnitude of the interest committed to him, that he may be the means of much good, or of extensive mischief. When actuated by high and honorable motives, the innocent may with confidence look to him for protection, and the injured for redress. But by basely betraying his trust, he becomes a scourge to society, and a stain to a profession everywhere esteemed honorable. Courts of justice ought, therefore, from a just sense of their own honor and integrity, as well as from a regard to the interest of the community, to be cautious whom they admit to minister in their temples, and firm in expelling from their portals, those whose conduct would pollute the judicial altar.

In this case, five charges are exhibited against the defendant. In relation to the first charge, the court is of opinion that a lawyer employed to defend a suit, is not authorized to consent to the entry of a judgment against his client without his assent; that his doing so is a violation of the confidence reposed in him, and if done with a corrupt intent, involves such a degree of moral turpitude as would authorize the court to strike his name from the roll of attorneys. Although the evidence establishes the fact that the defendant confessed a judgment in the case of Wright, without his knowledge or consent, still, as it is not satisfactorily shown that the motive which induced the act was corrupt and criminal, nor that Wright, the defendant in the action in which the consent to an affirmance of the judgment was given by defendant, was injured thereby—he not having, as far as the testimony shows, any legal defence in that cause—and as the defendant may possibly have misconceived his powers, we are of opinion that the first charge and specifications are not made out.

The court, however, deems it proper and necessary to say, that while the proof does not authorize the finding of the specifications and charges proved, still the defendant's conduct is not free from censure.

The testimony in relation to the second charge is so inconclusive, and involved in so much confusion and obscurity, that it furnishes no data upon which to form an opinion unfavorable to the defendant. He is therefore acquitted of that charge.

The court cannot sanction the alteration of the execution mentioned in the third charge. From the evidence, the inference is strong that it was made by the defendant, and the court, on the presumption of the case, might so consider it; yet, as we do not perceive any criminal motive on the part of the defendant, to make the alteration complained of, and as no injury resulted from the alteration to either of the parties in the suit—and inasmuch as it is not manifest that any was intended, the court consequently acquits the defendant of this charge; but wishes it to be distinctly understood, that an alteration of the process of the court, between its delivery by the clerk to the party or his attorney, and its reception by the sheriff, is illegal, and highly improper. The court does not consider that part of the third charge sustained by proof, which accuses the defendant of corruptly bargaining with Green, to receive 25 per cent. interest for his own benefit.

With reference to the fourth charge, the counsel for the defendant, in the argument admitted that he had been guilty of an indiscretion in his conduct, in the offer he made to Berry, of his services in a suit in which he had been employed on the other side, provided his client would release him. The court feels constrained to say, that an act of this kind is highly censurable, although there may have been an absence of a corrupt motive, and the offer may have proceeded from a want of reflection, and a just sense of the position an advocate occupies when retained by his client. Nothing, in our judgment, is more undignified and degrading, than for a lawyer to solicit business of those who are litigating; but more especially do they consider it derogatory to professional propriety, for an attorney, after he is in possession of his client's secrets, to intimate a willingness to go over to the opposite side, either with or without the consent of his client. If the conduct of a client should be so dishonorable or improper, as to warrant the advocate in withdrawing from his cause, yet a just sense of the delicacy of his position, and a regard for the honor and character of the profession, should admonish him not to intimate or express a willingness to be employed by his client's adversary, and particularly not to act for him in advance. As it appears from the evidence, that the defendant never refused his services to Catlin, nor abandoned his case, he is necessarily acquitted of the fourth charge.

The court is of opinion that the proof is insufficient to sustain the fifth charge. The defendant is therefore acquitted.

The information in this case, it will be seen, contains five charges. Wright, the relator, is the only person charged to have been injured by the alleged misconduct of the defendant. He appears in the

The People v. Lamborn.

character of a complainant. The other persons alleged to have been injured by the conduct of the defendant, either do not appear at all, or such as do, in most instances, express in their examination (whatever may have been their declarations elsewhere) their satisfaction with the professional conduct of the defendant in their causes. From these facts thus developed, the court, from a sense of justice, and with a view of discouraging applications that cannot be supported by proof, wish it to be understood, as a general rule, that they will not favor applications of this character, where the party alleged to have been injured by the misconduct of the attorney, shall not be the complaining party, and the facts charged are not supported by the oath of that party, or some other person who shall affirmatively allege their truth, and not merely their belief of their truth from the information of others. In laying down this general rule, the court does not mean to be understood, that there may not be a case of circumstantial evidence which might justly call for its interposition, but the inference from the facts sworn to, should be strong and overpowering, and the invaded rights of the injured individual demand the investigation, before the party should be called upon to answer the accusation. It is not upon every idle rumor put forth with the garb and semblance of truth, aided by feelings of hostility, that a member of the profession should be arraigned for supposed misconduct. It is the duty of the court to guard with vigilance every member of the bar from such assaults, while at the same time it should not shrink from inflicting exemplary punishment upon those who are guilty of acts of delinquency.

From a consideration of all the circumstances of this case, the court cannot refrain from admonishing the defendant of the necessity which in its opinion exists, that he should hereafter guard his reputation with a jealous watchfulness, and that the indiscretions which have been committed may not be repeated. It is also hoped that while every member of the bar may feel a deep interest in the reputation of the profession, that no one will too readily listen to charges and accusations against their professional brethren, nor be their accusers without good cause.

BROWNE, J., *dissented.*

Rule discharged.

N. W. Edwards, attorney-general, for relator.

Prose. for respondent.

Ditch v. Edwards.

Wickersham v. The People.

DITCH v. EDWARDS.

1 SCAM. R., 129.

Error to Monroe.

1. A DEPUTY must return process in the name of the principal sheriff. (a)
2. A default based upon an insufficient return of a summons, is illegal.
3. A cause will not be remanded, where the proceedings in the inferior court were *coram non judice*.
4. The reversal of an illegal judgment is no bar to a second action for the same cause.

*Judgment reversed.**J. B. Thomas and D. Prickett, for plaintiff.**N. W. Edwards, for defendant.*

(a) S. P. Ryan v. Eads, Breese R., 168.

WICKERSHAM v. THE PEOPLE.

1 SCAM. R., 128.

Error to Clay.

1. CORRUPT misconduct by a justice of the peace is indictable.
2. If a justice corruptly causes an estray to be appraised *before himself*, the act is indictable.
3. The Supreme Court, in a criminal case, will not presume that the same persons who were grand jurors, sat upon the petit jury, merely because their names are alike.
4. Challenges for cause must be made, *if known*, before trial.
5. In criminal cases, the jury are judges of the law and fact.
6. When the proceedings are regular, the Supreme Court will not interfere and grant a new trial, simply because the verdict is against evidence.

*Judgment affirmed.**Breese, for plaintiff.**N. W. Edwards, attorney-general, for defendants.*

Harmison v. Clark.

Irvin v. Wright.

HARMISON v. CLARK.

1 Scam. R., 131.

Error to Franklin.

1. WHERE a cause is once tried, and a new trial awarded; and on the second trial the same result is arrived at, a bill of exceptions taken on the original trial cannot avail the defeated party, on writ of error. He should renew his exceptions.

2. A motion to set aside a default is addressed to the discretion of the inferior court, and the decision thereon cannot be assigned as error.

3. A party cannot assign for error, a decision which was made for his own benefit.

*Judgment affirmed.**Grant*, for plaintiff.*Scates*, for defendants.

IRVIN v. WRIGHT.

1 Scam. R., 135.

Error to Gallatin.

1. *Actio non* relates to the time of the commencement of the action, and not to the date of filing the plea.
2. A judgment recovered after the action was commenced cannot be pleaded by way of set-off.
3. The English statute of set-off and our own should be construed alike as to the time the set-off attaches.

LOCKWOOD, J.—This was an action of *assumpsit* brought by Wright to recover compensation for work and labor done and performed for Mrs. Irvin while sole.

Among other pleas which it is unnecessary to notice, the defendants below pleaded, that since the commencement of the suit in the court below, they had recovered a judgment against Wright, which they offered to set off against the damages sustained by the plaintiff in this suit. To this plea Wright demurred, and the Circuit Court sustained the demurrer.

Did the court err in this judgment? By the 17th section of the "*Act concerning Practice in Courts of Law*," it is provided that "The defendant in any action, brought upon any contract or agreement, either express or implied, having *claims or demands* against the plaintiff, may plead the same," etc. The only question for our consideration under this act is, at what time must the claims or demands exist, so as to justify their being set off against the plaintiff's demand? It was contended in the argument, by the counsel for Irvin, that our

Irvin v. Wright.

Tindall v. Meeker.

statute was more comprehensive than the English statute of set-off, and therefore a debt or demand due or accruing after suit brought, might be set off. The court, however, upon an examination of the English statute of set-off, are of opinion that although the phrase in our statute, "claims or demands," would admit of a construction that would embrace more modes of indebtedness than the phrase "mutual debts," used in the English statute, yet in respect to the time at which the "claims or demands," under our statute, and the "mutual debts" under the English statute, should exist so as to be the subject of set-off, the same construction as to both statutes ought to prevail.

In the case of *Evans v. Prosser*, 3 T. R., 186, the Court of King's Bench held that a judgment recovered after the action was brought, and before plea pleaded, could not be pleaded as a set-off. This decision we think in point, and we do not perceive that it violates any principle of justice, or the intention of the legislature. Should a different construction prevail, gross injustice might frequently be practised. The plaintiff, when he commences his suit, has a good cause of action, and to which the defendant has no defence; yet if the rule should be established that "claims or demands" might be pleaded that originated or became due after suit is brought, it will put it in the power of the defendant, by purchasing a note against the plaintiff, to defeat his action, and consequently charge him with the costs. This cannot be reasonable, nor can it be supposed that the legislature intended to enable the defendant by an act of his own, to defeat the plaintiff's right of recovery in a case so situated.

Judgment affirmed.

Eddy, Grant, and Breese, for plaintiff.

Gatewood, for defendant.



TINDALL v. MEEKER.

1 Scam., 137.

Appeal from Madison.

1. ON the trial, in the Circuit Court, of an appeal from the judgment of a justice of the peace, the proceedings upon the trial must be *de novo*.

2. Where the proceedings before the justice is upon a note, upon the trial of the appeal the interest must be computed upon the note, and not upon the judgment appealed from.

3. On the trial of an appeal from the judgment of a justice in the Circuit Court, the latter court, in case of an affirmance, must render

Tindall v. Meeker.

Hall v. Byrne.

judgment for the amount then found to be due the plaintiff below, though the judgment of the Circuit Court may exceed the jurisdiction of the justice, provided the latter had jurisdiction of the subject matter at the time of the commencement of the suit before him.

4. The rule in all appeal causes is, that if the inferior court had jurisdiction *ab origine*, no subsequent fact arising in the case can defeat it.

5. A contract which forms the basis of a suit is merged in a judgment rendered thereon.

6. Under the act of 1833 a contract to pay any rate of interest will be sustained.

Judgment affirmed.

Semple, for appellant.

J. B. Thomas, for appellee.



HALL v. BYRNE.

1 Scam., 140.

Error to Jackson.

1. In a *scire facias*, to foreclose a mortgage, a plea of no consideration, or of a total or partial failure thereof, cannot be sustained.
2. A statute which treats of things or persons of an inferior rank cannot, by any general words, be extended to those of a superior.
3. Definition of a mortgage.

LOCKWOOD, J.—Under the pleadings, the question presented for the consideration of this court is, whether a mortgage, executed and recorded according to the statute, is a “note, bond, bill, or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions by the obligee or payee thereof,” and liable to be defeated by either of the pleas above mentioned. To arrive at a satisfactory answer, it is necessary to inquire into the nature and effect of a mortgage. “A mortgage is a conveyance of lands, by a debtor to his creditor, as a pledge or security for the repayment of money due, with a proviso that such conveyance shall be void on payment of the money and interest on a certain day; and in the event the money be not paid at the time appointed, the conveyance becomes absolute at law, and the mortgagor has only an *equity of redemption*; that is, a right in equity, on payment of principal, interest, and costs, within a reasonable time, to call for a reconveyance of the lands.”

From this definition, a mortgage of lands (the execution of which is attended with many legal solemnities, and must be acknowledged

Hall v. Byrne.

Garner v. Crenshaw.

and recorded, as are all other deeds affecting real estate) cannot be such an instrument in writing as is contemplated by the 5th section of the act aforesaid. A mortgage is certainly not made negotiable by the act, nor is it an instrument for the direct performance of covenants or conditions by the obligee or payee, although it is subject to be defeated by the payment of money. Mortgages were in common use when this statute was passed, and had the legislature intended to have them defeated by such pleas as were interposed in this case, there can be no doubt that they would have been enumerated. It is also evident that mortgages were not intended to be embraced within the act, because the legislature use the words "obligee or payee," when designating the plaintiff to whose action these pleas may be pleaded, instead of the term "mortgagee." The terms "obligee or payee" have a technical and definite meaning in the statute under consideration, and apply only to notes, bonds, and bills, whether such notes, bonds, or bills are given for the payment of money or property, or the performance of covenants or conditions, and not to mortgages.

It is also a well-settled rule of the common law, that statutes which treat of things or persons of an inferior rank cannot, by any *general words*, be extended to those of a superior. Mortgages are clearly instruments of a higher dignity than bonds, promissory notes, or bills, because greater solemnity is required in their execution. They are required to be recorded, and the same remedy given as in case of judgments. The court therefore conclude, as well from the general scope and object of the act relative to "promissory notes, bonds, due bills, and other instruments in writing, and making them assignable," as from the consideration that the proceeding authorized in this case is by *scire facias*, and founded on a record, that a mortgage is not embraced in the 5th section of the act above mentioned, and consequently the pleas were correctly overruled by the court below.

Judgment affirmed.

Gatewood and Scates, for plaintiffs.

Grant and Eddy, for defendants.

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GARNER v. CRENSHAW.

1 SCAM. R., 143.

Error to Gallatin.

1. AN application to set aside a default is addressed to the discretion of the inferior court, and the decision thereon cannot be assigned for error.

Garner v. Cremshaw. Piggott v. Ramey. Crisman v. Matthews. McKinney v. Finch.

2. Where a term intervenes between the default and motion, to set it aside, no relief can be granted.

Judgment affirmed.

Grant, for plaintiff.

Eddy, for defendant.



PIGGOTT v. RAMEY.

1 Scam. R., 145.

Error to Monroe.

1. AN "order" does not *ex vi termini* mean a judgment.

2. When the legislature confer power upon an inferior court to enforce an order in a particular manner, all other modes are excluded.

3. The courts of probate have no power to enter a judgment against an administrator or executor, at the instance of heirs or devisees, to compel them to pay a distributive share, or legacy due them.

Judgment reversed.

Cowles and *N. W. Edwards*, for plaintiff.

Breese and *Snyder*, for defendants.



CRISMAN v. MATTHEWS.

1 Scam. R., 148.

Appeal from Morgan.

1. In an action by a sheriff upon a delivery bond, it is unnecessary to prove a levy, where the suit was commenced by attachment—the judgment of the court is conclusive upon this point.

2. Where a delivery bond recites the issuing of an attachment and a seizure by the sheriff, the obligors are estopped from denying the facts so recited.

Judgment affirmed.

W. Thomas, for appellant.

McConnel, for appellee.



McKINNEY v. FINCH.

1 Scam. R., 152.

Appeal from Morgan.

The dismissal of a suit by a justice of the peace is no bar to a subsequent suit between the same parties for the same cause of action.

LOCKWOOD, J.—Finch sued McKinney before a justice of the

McKinney v. Finch.

peace, on a sealed note, and recovered judgment. The suit was taken into the Circuit Court of Morgan county by appeal. On the trial in the Circuit Court, Finch gave the note in evidence. McKinney then proved that on the same day of the trial of the cause before the justice, there was a previous suit in favor of Finch against McKinney, which was founded also on a promissory note, not under seal, made payable to the plaintiff, and signed James McKinney, by his agent John A. McKinney. This suit the justice dismissed, because the agency of John A. McKinney was not sufficiently established. Both suits were tried before the same justice, and both notes did not amount to the sum of \$100. The defendant then pleaded and relied upon the 16th section of the "*Act concerning Justices of the Peace and Constables*," as a bar to the action; but the Circuit Court overruled the defence, and gave judgment for the sealed note above-mentioned. The court also decided that the plaintiff had a right to recover on one note, and no right to recover on the other note. The 16th section above referred to provides that "In all suits which shall be commenced before a justice of the peace, each party shall bring forward all his or her demands against the other, which are of such a nature as to be consolidated, and which do not exceed \$100 when consolidated into one action or defence; and on refusing or neglecting to do the same, shall be forever debarred from the privilege of suing for any such debt or demand." Did the Circuit Court err in overruling the defence set up under this section of the act regulating trials before justices of the peace? Did the legislature mean that the bare commencement of a suit, in which the plaintiff and defendant did not consolidate all their demands, should, whether the cause was tried or not, bar all debts or demands not consolidated? The objects the legislature doubtless had in view, were to prevent the multiplicity of suits, where the matters in dispute were small, and to avoid the unnecessary accumulation of costs. These objects are affected, by deciding that where a suit is commenced before a justice, in which all the demands of the parties may be investigated consistently with the rules of law, and such suit terminates in a judgment binding upon the parties, if the parties do not bring forward all their demands which might have been consolidated into one action or defence, then such demands, thus neglected to be exhibited, shall not be the foundation of a future action. To give a construction to this section, that the commencement of a suit without a trial and judgment, should bar the claims of both parties, would be productive of the greatest injustice. To illustrate this position, we will suppose the following case: A plaintiff commences an action before a justice, and on the trial dis-

McKinney v. Finch.

Dedman v. Williams.

covers that his testimony is insufficient to support his action, and he submits to a nonsuit. This he certainly may do, and then bring a new suit for the same cause of action, and upon sufficient proof recover his demand. Can it with propriety be insisted if the judgment of nonsuit in the supposed case does not bar the demand sued on, that it can have the effect to sue a demand not exhibited before the magistrate,—and ever bar a demand of the defendant, that he has had no opportunity to litigate? These would be the absurd consequences of deciding that the parties must bring forward all their demands upon pain or forfeiting them if a suit be commenced, whether that suit result in a final judgment or not. Such consequences were never intended, and consequently we are bound to give this statute such a construction as will effect the objects contemplated by the legislature. These objects are accomplished by constructing the statute to mean, that where a suit is brought before a justice, which terminates in a final judgment on the merits, there both parties shall be precluded from further litigation in relation to all matters that might have been decided in that case. The dismissal of the case first tried by the justice, was in effect a nonsuit, and did not bar the bringing of a new suit for the same cause of action, and consequently could be no bar to bringing another suit for a different cause of action.

Judgment affirmed.

Lamborn, for appellant.

W. Thomas, for appellee.

DEDMAN v. WILLIAMS.

1 SCAM. R., 154.

Appeal from Hancock.

1. One cannot, by his own voluntary act, make himself the creditor of another.
2. One of several joint debtors cannot compel contribution until he has paid or settled the debt.
3. Nor can he recover if he pays the debt before it matures.
4. The giving of a promissory note, under such circumstances, is not a payment of the debt.
5. A *compulsory nonsuit* awarded by the Supreme Court.

LOCKWOOD, J.—This was an action brought before a justice of the peace, by Williams against Dedman, for money paid by Williams for the use of Dedman. On the trial before the justice, a judgment was rendered in favor of Williams for \$72 37½. The cause was brought by appeal into the Circuit Court of Hancock county, where it was tried before a jury, and judgment for \$76 38 recovered. On the trial in the Circuit Court the plaintiff below proved in substance that one Whitney

and others purchased a number of cattle at an administrator's sale, for which they gave their notes to the administrator. That afterward the plaintiff and defendant, with another person, purchased half of said lot of cattle of Whitney and others, paying them \$30 for their bargain, and agreed to give their note in lieu of said Whitney's note to said administrator, he agreeing to accept plaintiff's and defendant's note, with security, for one-half of the amount of Whitney's note, which had been given for the original purchase money. That after the purchase made by plaintiff and defendant, and the agreement of the administrator to take plaintiff's and defendant's note for half of the purchase money as aforesaid, plaintiff and defendant took possession of the half of said lot of cattle, as their joint property. It was also proved that plaintiff and defendant were to execute their note to said administrator, at some convenient time. That shortly after these contracts, Dedman started with the cattle to Galena, to sell them on the joint account of plaintiff and defendant. That during the absence of Dedman, Williams gave his note, with security, to said administrator, for the price of said cattle so purchased of the said Whitney. And the said Whitney, upon the surrender of the original note, executed his note to said administrator for the other half of the original purchase money for the cattle bought at said administrator's sale. That when Dedman returned from Galena, he divided with Williams the proceeds of the sale of the cattle. The administrator testified that he held and considered Dedman liable to him on the promise to give his note, and that he had not released him. On this state of the case, Williams brought his suit against Dedman, to recover one-half of the amount for which plaintiff and defendant had agreed to give their joint note, with security, to said administrator. Some irrelevant testimony was also produced, which it is not necessary to notice. After the plaintiff, Williams, had concluded the testimony as above detailed, Dedman's counsel moved the court to instruct the jury to find for the defendant, as in case of a nonsuit, which motion, after argument, was overruled by the court. After this motion was overruled, testimony was introduced by defendant, and other instructions were asked; but from the view taken of the cases, it will be unnecessary to notice any other point except the question, whether the court ought to have instructed the jury that the plaintiff was not entitled to recover upon the evidence that he had adduced?

What was the character of the contract between the plaintiff and defendant? They purchased of Whitney a lot of cattle, and paid him \$30 down, and for the remainder of the purchase money agreed to give their joint note to an administrator, at whose sale Whitney had

purchased the same cattle. When the note was to be made payable, does not appear from the testimony. It is, however, a fair presumption that some time was to intervene before it became due. Can, then, one of two joint purchasers of property, on a credit, before the time of credit has expired, by giving his individual note for the purchase money, immediately sue his co-purchaser for his proportion of the joint debt? We think not. The rule of law is well settled, that one man cannot make himself, by his own voluntary act, the creditor of another. The relation that existed between Williams and Dedman by the purchase of the cattle was that of joint owners or partners, not that of debtor and creditor to each other. Both were bound, when the time of payment arrived, to make payment either to Whitney or to the administrator; and neither could, by any act of his own, coerce payment from the other until the time of payment for the cattle had arrived. Nor would it vary the result of the case if the time of payment for the cattle had elapsed when this suit was brought. The giving the note by Williams for the property purchased for the joint use of himself and Dedman, was no payment so far as Dedman was concerned. Dedman was certainly bound to pay his moiety for these cattle, either to Whitney or the administrator of whom Whitney purchased. If his promise to give his note to the administrator should be void under the statute of frauds, upon which point it is unnecessary to give an opinion, he would still be bound to pay Whitney, of whom he and Williams made the purchase. As we, however, consider the law well settled, that one co-partner or co-purchaser can in no case recover in an action for money paid, against his co-partner or co-purchaser, until the money has actually been paid, nor then until the time of payment has arrived, we are of opinion that the instruction ought to have been given. Had the instruction been given, the plaintiff would doubtless have submitted to a nonsuit. This court, therefore, reverse the judgment below, and render such judgment as ought to have been rendered, to wit, a judgment, as in the case of nonsuit, with costs.

Judgment reversed, and nonsuit entered.

A. Williams, for appellant.

Ford and *Whitney*, for appellees.

BRUNER v. MANLOVE.

1 Scam. R., 156.

Error to Schuyler.

1. The elder patent or elder certificate of entry must prevail in the action of ejectment.
2. Neither can be impeached at law by proof of a prior equity, and a junior patent or certificate based thereon. (a)

THIS was an ejectment to recover the N. W. qr. sec. 30, 2 N. 1 W. 4th P. M., in Schuyler county. The facts were, that the plaintiff entered the land in question, August 3, 1830, from the United States, and proved his entry by the certificate of the register of the Land Office, bearing date November 3, 1834. It was also proved that the defendants were in possession at the time of the commencement of this action. The defendants then proved an entry of the same land, at the same land office, on January 29, 1831, and also offered to, and did prove, that they were in possession and cultivated the land prior to the date of the plaintiff's entry, under the preëmption laws of the United States, of May 29, 1830. Judgment for defendants. The plaintiff prosecutes his writ of error thereon. The cause was heard *ex parte*, the defendants refusing to join in error.

SMITH, J.—On this state of the case, three questions seem naturally to arise out of the evidence, on the second instruction prayed for:

1st. What is the rule in reference to the conveyance by the government of the United States of its land, where there are two sales and conveyances of the same land to different persons, and at different periods of time?

2d. What is the character and effect, and what the extent of the rights of the parties, derived from the certificates of the United States' land officers, by the laws of this State?

3d. Was the refusal of the court to give the instruction prayed for by the plaintiff's counsel, an error?

On the first point, we presume that a patent for land, or any mode of sale adopted by the government for the disposition of the public domain, must be subject to the same rules of interpretation as ordinary cases. It will not, we apprehend, be for a moment contended to be otherwise. What, then, is the rule where two patents have issued for the same lands, to different persons, at different times? The elder patent is the highest evidence of title, and as long as it remains in force, it is conclusive against a junior patent. The second patent is inoperative and void, if the land passed by the first patent.

It is the almost universal rule of our courts, to look to the elder patent in all questions of title, and to give it effect. It is not for the

court to look to any equitable claim on the General Government which a third party might have in respect to lands conveyed to another person prior to the issuing the patent.

The elder patent must be impeached and vacated, before any title can be set up under the younger one, and it cannot be impeached by parol proof in such an action as the present. Letters patent are matter of record; they can alone be avoided in chancery by a writ of *scire facias* sued out on the part of the government or by some one prosecuting in its name, or by a bill in chancery. The settled English practice is so, and we have no law or practice prescribing a different course. By an examination it will be found, that the authorities, both English and American, speak of the case of two successive patents for the same thing, and that the second patent is void, though some differ as to which shall pursue the remedy to vacate either. The better construction, however, and one more consonant to the nature of the case, seems to be, that the *scire facias* should be prosecuted by the second grantee, to avoid the first, it being a matter of record, or that he pursue his remedy by bill in chancery.

In Virginia, by a law of that State, a patent may be declared void from defects appearing on its face, without the necessity of resorting to a *scire facias* to repeal it. Considering, then, that the rule of law is as stated, in reference to two patents issued at different times, to different persons, for the same thing, we are necessarily led to the consideration of the second point, in which is to be examined the character and effect of the certificates of the register and receiver, and the rights of the respective parties under them.

By the 4th section of the act declaring what shall be evidence in certain cases, approved 10th January, 1827, it is declared that "The official certificate of any register or receiver of any land office of the United States, to any fact or matter on record in his office, shall be received as evidence in any court in this State, and shall be competent to prove the fact so certified. The certificate of any such register of the entry or purchase of any tract of land within his district, shall be deemed and taken to be evidence of title in the party who made such entry or purchase, or his heirs or assigns, to recover possession of the land described in such certificate, in any action of ejectment or forcible entry and detainer, unless a better, legal, and paramount title be exhibited for the same." From this section of that act, it is manifest that the register's certificate is raised to as high a character in point of evidence, in the present form of action, as a patent possibly could be. Its effect is to be the same, and the rights derived from it for the purpose of recovering or maintaining posses-

sion of lands described in it, are co-extensive with the most formal, regularly issued patent.

These certificates not only vest the title acquired by purchase from the government in the purchaser, for the purpose named, but make that title transmissible to the heir or to the assignee. For any purpose, then, so far as regards the character of these certificates as evidence in an action of ejectment, they must be considered of as high dignity as patents, and partaking of all their legal attributes. Having settled their character and effect, the rights of the parties under them must be governed by the same rules of interpretation as in the case of patents. No reason can exist for an exception. There is, however, a point of some importance in the case, which seems not to have been adverted to by counsel in the court below or here. The certificate of the register given to Bruner, shows the fact that the land was purchased after the passage of the preëmption law. But whether the defendants established their right to the preëmption at the land office, before or after the purchase by Bruner, does not appear in the case. We might presume it was subsequent thereto, and at the time of the payment of the purchase-money; but the register's certificate is given on the 19th September, 1834, and recites that the purchase was made in pursuance of the act of the 29th May, 1830. But the receiver's certificate negatives the idea of its being a preëmption purchase by defendants, for there is no recital in the receiver's certificate that it was so purchased.

Whether in pursuance of the act of Congress of the 29th May, 1830, the defendants acquired a previous right of purchase of the land in question, we have no means of determining, except so far as the certificate of the register of the land office may lead to such conclusion. But, on the other hand, the certificate of the first purchase in August, 1830, by Bruner, is equally as conclusive that the government would not have sold land to which the defendants had a preëmption right of purchase. The certificate, however, being placed on the same ground as an actual patent for the purpose of evidence in this action, we are bound to consider the first as conclusive until vacated. Whether the same solemnities and forms of proceeding are to be observed to vacate it as in the case of a patent, is a question we are not now called on to determine. That it could not be contradicted by parol, is, however, certain. It would require, we should suppose, some legal proceedings to be had before it could be vacated. Whether there might be sufficient cause to do that, is also a matter not before the court for its decision. We can know nothing of the merits of such a matter at this time.

Bruner v. Manlove.

Berry v. Wilkinson.

The third point is easily settled. The principles here laid down as to the character and effect of the first certificate, and the rights of the party under it, determine the refusal of the Circuit Court to have been erroneous in refusing the instruction asked. The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to the Circuit Court to award a *venire de novo*, and for further proceedings not inconsistent with this opinion.

*Judgment reversed.**McConnel*, for plaintiff.

(a) The defendants afterward succeeded in establishing their title by decree in equity. *Bruner v. Manlove*, 8 Scam. R., 339.

BERRY v. WILKINSON.

1 Scam. R., 164.

Error to Morgan.

1. In civil causes, a reasonable notice must be given the adverse party of a motion for a change of venue, where the ground relied upon is the prejudice of the inhabitants of the county where the suit was instituted.
2. What constitutes a reasonable notice depends upon the facts of each particular application.
3. The reasonableness of the notice is addressed to the discretion of the inferior court.
4. An application for a change of venue, made on the fifth day of the term, based upon a notice given on the third day, without stating any reason for the delay, is not in time.

WILSON, C. J.—On the third day of the last October term of the Morgan Circuit Court, the plaintiff in error gave notice to the plaintiffs below, the defendants in error, that he would apply to the court for a change of venue in this cause, and several days afterward he made the application, founded upon an affidavit setting forth that the plaintiffs had an undue influence over the minds of the inhabitants of Morgan county, and that the inhabitants of said county were prejudiced against him, so that he did not expect a fair trial in that county. The court overruled the application for a change of venue. To which opinion the plaintiff in error excepts, and assigns the refusal of the court to grant his motion, as the ground for the reversal of this case.

The statute that authorizes a change of venue for causes therein enumerated, requires that *reasonable* notice of an application to the judge or court for such purpose, shall be given to the adverse party, or his attorney. The length of time necessary to constitute reasonable notice, will in some degree depend upon the peculiar circumstances of each particular case, and must necessarily be left to the legal discretion of the judge or court to which the application is made. In this case, the court in the exercise of that discretion, de-

Berry v. Wilkinson.

Swafford v. Dovener.

cided the notice to be insufficient; and we are not satisfied that the decision is not warranted by the circumstances of the case. For aught that appears in the petition, the existence of the prejudice of which the defendant below complains, may have been known to him for months before the term. If such was the fact, and it may be inferred from the contrary not being averred, the court might very properly say that notice during the term of the court, after the plaintiffs had incurred the expense of a preparation for trial, was not such reasonable notice as the statute contemplated.

Judgment affirmed.

McConnel, for plaintiff.

W. Thomas, for defendants.



SWAFFORD v. DOVENER.

1 Scam. R., 165.

Appeal from Franklin.

1. A bill of exceptions is illegal, unless the exceptions are taken upon the trial, and before the jury are discharged.
2. Such a bill lies for receiving improper, or rejecting proper testimony, or misdirecting the jury on a point of law arising in the cause.
3. A bill of exceptions will not lie in a case where a jury is waived, and the cause is tried by the court.

SMITH, J.—This was an action of *debt* upon a note, instituted before a justice of the peace, in which the appellee recovered judgment for \$22 50. By appeal it was taken into the Circuit Court, and there tried by the court without the intervention of a jury, and the judgment of the justice of the peace affirmed. The cause is brought by appeal to this court. A bill of exceptions was taken to the judgment of the Circuit Court, on the evidence adduced before that court, and this court is now called on to say whether, on that evidence, the Circuit Court ought to have given judgment for the plaintiff in the court below.

It is conceived that an important question of practice is now presented, involving the refusal or sanction of the court to the mode and time of taking the bill of exceptions in the cause, as also the character and matter therein contained, and by which the future practice in relation to appeals from the decisions of justices of the peace, retried in the Circuit Court, is to be settled. Whatever may have been the practice heretofore, in reference to cases of this character, by presumed assent of the parties, because the point has not been heretofore raised, it furnishes no reason or argument if it be intrinsically wrong and improper in itself, for its further continuance. The cases heretofore decided in this court, referred to in support of the practice, and

which it is supposed sanction the form of the proceedings, are very far, it is conceived, from so doing. The strongest and most relied on, is the case of *Johnson v. Ackless*, decided in June term, 1825. By an examination of that case, it will be perceived, that the only point there decided, was, that a bill of exceptions might be signed at the term to which the cause had been continued, after the hearing and trial, and when judgment was given. As no judgment was given at the term at which the cause was tried, the court there say, that the party had no knowledge whether a bill of exceptions would be required to be signed, and that they had no opportunity of taking it sooner. It is also said, that the trial of appeals is an anomaly in the law, and the rules of taking bills of exceptions in ordinary trials by jury, cannot apply. It could never have been the intention of the court in that case, to say, that matter to which a bill of exceptions could not lie, according to the well settled principles of law, might be excepted to because the trials of appeals was an anomaly. It must have been its intention to confine it to the time and manner of taking the bill of exceptions, and not to the matter contained in the bill. The question was not then presented, as it now is, whether a bill of exceptions will lie to the judgment of the court on the evidence. There is nothing in the case decided, which touches on the present point, and we cannot perceive that the present question can touch that case, or the decision now made in any way conflict therewith. What then is the case now presented, and by what principles and rules should it be governed? To understand those principles and rules, we must inquire in what cases a bill of exceptions lies. "A bill of exceptions cannot be taken unless the exception be made on the trial, and before the jury is discharged; and it lies for receiving improper, or rejecting proper testimony, or misdirecting a jury on a point of law." This is the rule laid down by the court in the case of *Clemson v. Kruper*. In the case before us, there was no exception for receiving improper testimony, or rejecting proper testimony, and as there was no jury, of course there could be no misdirection of them. The party did not demur to the evidence, and ask the judgment of the court, whether in law it was sufficient to authorize a recovery; nor can it be assimilated to such a proceeding, because the exception is taken after the final judgment of the court. The exception goes to the judgment of the court on the evidence in the cause, and is taken after its final judgment. Can it be that an exception will lie in such a case? The rule is universal, that an exception will only lie in the cases named, and that the matter or decision excepted to, must have arisen during the progress of the cause, and before

Swafford v. Dovener.

Sands v. Delap.

final judgment. As well might a motion be sustained to arrest a judgment after its final rendition. Although it is true that the court act in the *quasi* character of a jury, yet as its whole decision on the facts, and the judgment of the law arising on those facts, is given at one and the same time, it seems wholly irregular to admit that, because it is so, a bill of exceptions ought to lie. The argument of inconvenience, which it is said will arise from an adherence to the rules regulating the taking of bills of exceptions in such cases, is not really founded in justice, because the party has only to require a jury trial and all difficulty vanishes. If by his own act and consent, he chooses to submit the decision on the facts and the law to the court, it is an inconvenience of his own selection. During the trial he has a right to object to the admission of improper evidence, and to insist on the admission of proper evidence, or of moving for a nonsuit for want of evidence, and if the court err in such case, he may except to the opinion of the court, and have the error corrected, if there be one. It is of infinite importance that innovations on the rules of proceedings should not be sanctioned, and that those which are found, after long use and practice, to be best adapted to the correct determination of causes, should be adhered to. For these causes we are of opinion that the judge might have refused properly to have signed the bill; but because he has not done so, it does not necessarily make the matter excepted to proper, nor legalize the manner of doing it.

*Judgment affirmed.**Scates*, for appellant.*D. J. Baker*, for appellee.

SANDS v. DELAP.

1 SCAM. R., 168.

Appeal from Schuyler.

1. UNDER the act of 1827 a justice has no jurisdiction where he is compelled to investigate an account exceeding the sum of \$100.

2. Nor has he in any case where feigned or unfair credits are given upon the account for the express purpose of conferring jurisdiction.

*Judgment reversed.**Breese*, for appellant.*Ford*, for appellee.

White v. Wiseman.Hutson v. Overturf.

WHITE v. WISEMAN.

1 SCAM. R., 169.

Appeal from Hamilton.

WHERE the parties waive a jury, a bill of exceptions will not lie.

*Judgment affirmed.**Scates*, for appellant.*Gatewood*, for appellee.

HUTSON v. OVERTURF.

1 SCAM. R., 170.

Appeal from Franklin.

WHERE A, an intruder upon the public lands, made an improvement thereon, and B entered the land, and then promised to pay A for such improvements—the promise is without consideration and no action can be maintained thereon. (a)

*Judgment reversed.**Scates*, for appellant.*David J. Baker*, for appellee.

(a) *Carson v. Clark*, 1 SCAM. R., 118, S. O. ante p. 258.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN JUNE TERM, 1835.

BLEVINGS v. THE PEOPLE.

1 Scam. R., 172.

Error to Jefferson.

WHERE a party pleads guilty to a charge of burglary or other criminal offence, the court has power, and it is the duty of the judge to receive the plea and sentence the offender.

Conviction affirmed.

Scates, for plaintiff.

J. B. Thomas, attorney-general, for defendants.

WILSON v. GREATHOUSE.

1 Scam. R., 174.

Error to Marion.

1. A RETURN upon process should state the time when the writ was served.

2. After the death of the officer who served the process, parol evidence is inadmissible to show *when* he executed it.

Judgment affirmed.

Saucyer, for plaintiff.

Wm. H. Brown, for defendant.

Clemson v. Hamm.

CLEMSON v. HAMM.

1 SCAM. R., 176.

Error to Madison.

THE return of an officer to a writ of summons should state the *time* of service.

Judgment reversed.

J. B. Thomas and *Prickett*, for plaintiff.

Semple, for defendant.

46.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1835.

BLAIR v. WORLEY.

1 Scam. R., 178.

Appeal from Vermilion.

1. A PURCHASER of lands from the government of the U. S., or of this State, acquires the right to all improvements made thereon by the government, or him as a squatter, anterior to his purchase.

2. Ordinarily, where "*persons*" are spoken of in a statute, the term applies to natural persons only, and not to governments or corporations, unless the context or reason of the law requires a different rule of interpretation. (a)

3. The act of February 23, 1819, relative to the erection of fences upon the land of another by mistake, does not apply to lands belonging either to the Federal or State governments. (b)

Judgment reversed.

McRoberts, for appellant.

Pearson, for appellee.

(a) S. P. Betts v. Menard, Breese App., 10.

(b) The statute alluded to is in these words:

"When any person or persons may, by mistake, erect and make a fence or inclosure on the land of another person, then, and in that case, when the line or lines are legally run by the proper authority, and the fence and inclosures are known to be on the land of such other person, the person or persons making such fence or fences as aforesaid, through mistake, shall be empowered and authorized by this chapter to enter into the said land of another, doing as little damage as possible, and take away the rails, posts, wood and stones, of which said fence or fences are made and erected, within one year from the time said line or lines may be legally run.

"The owner or owners of any land whereon a fence or fences may have been made by mistake, shall not

Blair v. Worley.

Webb v. Sturtevant.

throw down, nor in any manner disturb the said fence or fences for one year from the time such mistake is found out.

"When either the owner of the rails, or the owner of the land, is desirous of having the line or lines run dividing such land, then, in that case, the person wishing such survey shall give the other person notice in writing, ten days before such survey is made, of the time and place of making such survey."

Cooke's Stat., 591-2, sections 19-21.

WEBB v. STURTEVANT.

1 Scam. R., 181.

Appeal from Cook.

1. In trespass *q. c. f.*, possession is a good title against an intruder.
2. Where the plaintiff relies upon a *naked* possession, he is confined to his *pedis possessio*.

LOCKWOOD, J.—This was an action of *trespass quare clausum fregit*, brought in the Cook Circuit Court, by Sturtevant against Webb, for breaking and entering the close of Sturtevant, and felling and carrying away the timber growing thereon. To the declaration filed in the cause, the defendant below pleaded not guilty. On the trial in the Circuit Court, the defendant below asked the court, among other things, to instruct the jury as follows, to wit, "That if the jury shall be of opinion, from the evidence, that at the time of the committing of the supposed trespasses, the plaintiff was a mere squatter on the land, without any title thereto, either in law or equity, and that said land was the property of the United States or of this State, and also that the supposed trespasses were not committed within the plaintiff's actual inclosure, then the law is for the defendant," which instruction the Circuit Court refused to give. This refusal is assigned for error, and the question presented is, whether the instruction ought to have been given. In actions of trespass *quare clausum fregit*, the law is well settled, that possession of the close is sufficient to sustain the action against any person who shall enter upon that possession, except the owner. The possession where that alone is relied on, must, however, be an actual and not a constructive possession. The mere entry upon a tract of land without any color of title, and inclosing a small part of it, does not, of itself, constitute an actual possession of any more land than is inclosed. A contrary doctrine would lead to great uncertainty. It could with as much propriety be contended, that the actual possession of a part of a tract of land drew to it the possession of a whole section containing 640 acres, as that such actual possession drew after it the possession of 160 acres, or any other legal subdivision of a lot. This would be manifestly unreasonable. The reason that the law protects the mere possession of land, where the

Webb v. Sturtevant.

Turney v. Goodman.

Lovett v. Noble.

possessor is a squatter, is to preserve the public peace ; and such protection is not intended as an encouragement to squatters, and ought not, therefore, to be extended any further than is necessary to attain the desired object.

Judgment reversed.

Morris and *Grant*, for appellant.

Spring and *Peck*, for appellee.

TURNNEY v. GOODMAN.

1 SCAM. R., 184.

Error to Wayne.

1. A REGISTER's certificate of an entry at a U. S. land office is evidence under the statute. (a)

2. A county surveyor can give parol evidence as to the location of a tract of land.

Judgment affirmed.

Pearson, for plaintiff.

Ficklin, for defendant.

(a) The statute is in these words :

"The official certificate of any register or receiver of any land-office of the United States, to any fact or matter on record in his office, shall be received in evidence in any court in this State, and shall be competent to prove the fact so certified." Cooke's Statutes, page 255, sec. 4.

LOVETT v. NOBLE.

1 SCAM. R., 185.

Appeal from Cook.

A SQUATTER upon public land, if he can maintain an action of trespass *q. c. f.* for cutting down timber, is confined in his claim of title to his *pedis possessio*. (a)

Judgment reversed.

Caton and *Douglas*, for appellants.

Peck and *Spring*, for appellee.

(a) S. P. Webb v. Sturtevant, 1 SCAM. R., 181, S. C. ante p. 294.

Pinckard v. The People. Slocumb v. Kuykendall. Drouillard v. Baxter. Seward v. Wilson.

PINCKARD v. THE PEOPLE.

1 SCAM. R., 187.

Error to Madison.

A *scire facias* is necessary in order to enforce a forfeited recognizance.

Judgment reversed.

Krum, for plaintiff.



SLOCUMB v. KUYKENDALL.

1 SCAM. R., 189.

Error to Gallatin.

IN case for slander the *substantial*, and not merely *equivalent* words, must be proved in support of the declaration.

Judgment affirmed.

Field and *Eddy*, for plaintiff.

Robinson and *Gatewood*, for defendant.



DROULLARD v. BAXTER.

1 SCAM. R., 191.

Error to Adams.

BEFORE answer filed the complainant has a *legal right* to amend his bill.

Decree reversed.

A. Williams and *Whitney*, for complainant.

Browning and *C. Walker*, for defendants.



SEWARD v. WILSON.

1 SCAM. R., 192.

Error to Adams.

A NON RESIDENT cannot sue before a justice of the peace, without first filing a bond for the costs.

Judgment affirmed.

A. Williams, for plaintiff.

Browning, for defendant.

PEARSONS v. LEE.

1 Scam. R., 193.

Appeal from Cook.

1. In a suit upon a written instrument, a copy thereof attached to the declaration is no part of the record.
2. The Supreme Court have two pair of eyes—the one natural, the other judicial; with the former they can see a note attached to a declaration, while they cannot do so with the latter.
3. Variances between the pleadings and proof must be taken upon demurrer to the evidence, a motion for a nonsuit, or by objection to the evidence.
4. An agreement to attend a public land sale is not illegal under the laws of the United States.
5. A declaration, stating that the defendant agreed to attend a public land sale, in consideration of \$200, and bid off for the plaintiff a certain tract of land, provided it did not sell for more than \$8 per acre, and averring that the plaintiff was ready to pay the \$200, and that the land was sold for less than \$8, yet the defendant did not bid upon the same, is good on general demurrer.

SMITH, J.—This was an action of *trespass on the case on promises*.

The declaration is on a special agreement in writing not under seal, and is described to have been entered into between the plaintiff and defendant for the purchase, sale, and conveyance of a certain quarter section of land; and it also avers that the defendant, for the consideration of two hundred dollars, to be paid by the plaintiff, engaged to attend the sale of the public lands at the town of Chicago, at a certain day named, and bid off the said quarter section; provided it could be purchased for a sum not exceeding eight dollars per acre, and to request the register of the land-office at said place to grant a certificate to said plaintiff in his name, on the payment of the purchase money by the plaintiff to the register; or if, on such payment, the certificate was issued to defendant, then he engaged to execute a good and sufficient warranty deed for said land. The breach assigned is that although the plaintiff was ready on his part to pay the two hundred dollars, and although the land sold for less than eight dollars per acre at such sale, yet the defendant did not and would not purchase said land, nor had he requested the register to make the certificate to said plaintiff; nor would he execute a good and sufficient warranty deed for the same land, or of any part thereof to the plaintiff, according to the tenor and effect of said agreement, although often requested, etc. To this declaration a general demurrer was interposed, and the Circuit Court adjudged the declaration bad. To the declaration is annexed a copy of the agreement, and if the court were permitted to look to that copy, which it cannot see with legal eyes, because it has been constantly decided by this court to form no part of the declaration, it might perceive that the agreement is signed by the defendant only, and is not binding on the plaintiff, and therefore void for want of mutuality; but on that point it can give no opinion, because it is not before the court. If the defendant had wished to have presented that question, he should have taken issue, and taken

advantage of it either by a demurrer to the evidence, or moved for a nonsuit on the trial for a variance between the count and the instrument declared on. This not having been done, the only question to be determined, is, whether the declaration is substantially good. No objection that can be perceived, exists to the declaration which would be available on a general demurrer, and for aught that appears, it is sufficient. Nor are we prepared to say that the contract, as stated in the count, is either *contra bonos mores*, or against any public law.

The contract, as laid, proposes, so far as is disclosed to the court, no more than the employment of an agent to purchase a piece of public land at the public sale, at a price stipulated, not only above the minimum price, but greatly so, at which the public lands may be sold, for a stipulated compensation, and to vest the title in the plaintiff. Here, then, is surely no combination to lessen the price, nor an arrangement not to bid against one another. The agreement presupposes a competition, because the agent is confined to not giving more than \$8 per acre. How, then, can this be said to be in violation of statutes of the United States, prohibiting combination to lessen the price of public lands? In what way can it operate to the injury of the public morals? Surely a person may legally depute another to bid for him, for the public lands, for any or no compensation, without violating any public law or contravening, in the least, principles of public policy, or without injury to public morals. It seems to be as free from such an imputation, as can possibly be imagined; and without extraneous evidence, to show that such was the intention and real object of the parties, can fraudulent motives be imputed without proof, and in the entire absence of any supposed reasonable motive?

Judgment reversed.

Cowles and Spring, for appellant.

Peck, for appellee.



ARNOLD v. JOHNSON.

1 SCAM. R., 196.

Error to Wabash.

1. THE assignor of a note is not the adverse party within the meaning of the statute which compels such party to become a witness before a justice—where a suit is brought by the assignee against the maker. (a)

2. Where a debtor pays money to his creditor, without designating the particular debt upon which it is to be applied, the creditor may

Arnold v. Johnson.

Mitcheltree v. Sparks.

Brother v. Cannon.

make such appropriation of the payment as he may deem proper, unless the facts justify some other appropriation.

3. Where a party makes an admission, his whole statement must be taken and construed together.

Judgment affirmed.

Pearson, for plaintiff.

Ficklin, for defendant.

(a) The statute was in these words:

"In all trials before justices of the peace, when either party may not have a witness or other legal testimony to establish his or her demand, discount, or set-off, the party claiming such demand, discount, or set-off, may be permitted to prove the same by the testimony of the adverse party."

MITCHELTREE v. SPARKS.

1 Scam. R., 198.

Appeal from Schuyler.

1. WHERE a justice renders a judgment against two defendants, and one only appeals to the Circuit Court, the cause upon such appeal should be docketed in the name of the appellant only.

2. If a justice has jurisdiction of a claim, and his judgment is appealed from, the Circuit Court may render judgment for more than \$100, if interest upon the claim has accumulated since the institution of the cause before the justice or the rendition of his judgment.

Judgment affirmed.

McConnel, for appellant.

Maxwell, for appellee.

BROTHER v. CANNON.

1 Scam. R., 200.

Error to Pike.

A capias ad satisfaciendum, not based upon oath, is void; but if it does issue upon the oath of an agent of the plaintiff, it is *voidable* only.

An officer is bound to execute process regular upon its face, where the tribunal issuing it had jurisdiction of the *subject matter* of the suit.

CASE against a constable. The declaration averred that the plaintiff sued out a *ca. sa.* from a justice's court, which was delivered to the defendant, who was a constable, to be executed and returned. This declaration contained three counts: 1, for not arresting the debtor; 2, for a false return; and 3, for an escape. Plea not guilty. The proof was a *ca. sa.* in due form, with parol evidence that the writ was based upon the oath of the plaintiff's agent. The oral evidence

was excepted to, and the court thereupon excluded the warrant and return thereon; to this the plaintiff also excepted.

SMITH, J.—It cannot be doubted that the Circuit Court erred on both points. It should have permitted the warrant and return to go to the jury, not merely because they had been properly read in evidence, but because it was legal and relevant testimony to establish the point at issue. In an action against an officer for an escape on process sued out, and placed in the officer's hands to execute, or in an action for a false return, or for a refusal to execute such process, it is no justification for suffering an escape, or for making a false return, or for a refusal to execute such process, that the forms of law in suing out such process have not all been observed. If the process be regular on its face, and it be not absolutely void, having been issued without the authority of law, the officer can never be made a trespasser, although it may have been erroneously issued; and he is bound to execute the process, although it may have been erroneously sued out. If the magistrate had jurisdiction of the subject matter, the officer was not bound to inquire further into the accuracy of his proceedings, but should have proceeded to obey the mandate of the warrant. In a case in England, Kenyon, Chief Justice, says, "It is incomprehensible to say that a person shall be considered a trespasser who acts under the process of the court." By the return to the warrant, the officer appears to have so acted, and the plaintiffs had a perfect legal right to inquire into the truth of such return. The warrant was not absolutely void, although the oath was made by the agents of the plaintiffs, but merely voidable, even if it be determined that the oath required by the statute could not be made by an agent. The testimony of the justice was wholly irrelevant, and ought not to have been received; and it was most clearly erroneous for the Circuit Court to exclude the warrant.

In the case of *Lattin v. Smith*, decided in this court at the December term, 1830, these principles are distinctly laid down; and they are supported by reference to numerous decisions made in both the American and English courts, and by one in particular, in which the judge of the Circuit Court of the United States says, "That where process is delivered to an officer, he is bound to act in conformity to the commands of the writ; and if he proceeds to execute it, he is bound to complete the execution."

Judgment reversed.

W. Thomas and Walker, for plaintiffs.

Browning, for defendant.

The People *ex rel.* Harris v. Taylor.

Latham v. Darling.

White v. Hight.

THE PEOPLE *ex rel.* HARRIS v. TAYLOR.

1 Scam. R., 202.

Application for a Habeas Corpus to the Supreme Court.

1. THE Supreme Court has no *original* jurisdiction to grant a writ of *habeas corpus*.

2. When a *habeas corpus* is essential and proper in exercising *appellate* jurisdiction, the Supreme Court may award the writ.

3. The judges of the Supreme Court in term time, or in vacation, may issue such a writ, returnable before either of them, at chambers.

Motion denied.

Cowles, for relator.

Field, for respondent.



LATHAM v. DARLING.

1 Scam. R., 203.

Error to Sangamon.

1. WHERE a note for \$33 $\frac{7.5}{100}$ is payable with \$3 *per month* interest, it does not mean that the interest is to be computed at and after the rate of 36 *per centum per annum*.

2. The Supreme Court will *modify* a judgment upon the hearing of a writ of error where the judgment below was erroneous, but the record shows what judgment ought to be rendered, and will not *remand* the cause.

Judgment modified.

Stuart and J. B. Thomas, for plaintiff.

C. Walker, for appellee.



WHITE v. HIGHT.

1 Scam. R., 204.

Error to Adams.

1. Under the act of February 10, 1827, a non-resident is not barred by the limitation prescribed for the commencement of suits, for the causes of action or forms of action therein enumerated.

2. *Non assumpsit*, within sixteen years, is a bad plea under the statute above recited.

3. Sixteen years constitutes a bar under that statute, only where the *form of action* is *covenant* or *debt*, or where the *cause of action* is upon an award.

4. Where a demurrer is sustained improperly to a replication, the cause will be remanded, with instructions to overrule the demurrer, and proceed consistently with the opinion of the Supreme Court.

LOCKWOOD, J.—This is an action of *assumpsit* commenced by White against Hight in the Adams Circuit Court. The declaration

contains two counts. The first count is on a promissory note dated the 26th day of January, 1819, for \$403. The second count is on a written agreement dated 1st October, 1824, by which the defendant promised to pay the plaintiff \$486 92, being the balance due the plaintiff on a note which he had held against the defendant, but which note had been lost.

The defendant pleaded three pleas, to wit, *non assumpsit*, *non assumpsit* within five years, as to both counts, and *non assumpsit* within sixteen years, as to the second count. To the second and third pleas the plaintiff replied, "That at the time when the said several causes of action and each of them did accrue to him, he, the said plaintiff, was in parts beyond the limits of this State, to wit, in the State of Ohio; and has ever since remained, and yet is beyond the limits of this State, to wit, in the State of Ohio." To which replication the defendant demurred, and the Circuit Court sustained the demurrer, and gave judgment for the defendant. The only question presented in this case, is, whether the "*Act for the Limitation of Actions, and for avoiding vexatious Law-suits*," approved February 10th, 1827, extends to non-resident plaintiffs. By the first section of the act, all actions upon the case, which term includes actions of assumpsit, and the other actions therein enumerated, shall be commenced within five years next after the cause of action shall have accrued, and not after. The second, third, fourth, and fifth sections limit the commencement of the several actions mentioned in these sections, to the times therein contained. The sixth section applies to the right of entry into land, and limits the time within which such entry may be made. The seventh section is in these words, to wit, "That every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments, shall be brought within twenty years next after the right or title thereto, or cause of such action accrued, and not after: *Provided*, that in *all the foregoing cases in this act mentioned*, where the person or persons who shall have right of entry, title, or cause of action, is, are, or shall be, at the time of such right of entry, title, or cause of action, under the age of twenty-one years, insane, beyond the limits of this State, or *feme covert*, such person or persons may make such entry, or institute such action, so that the same be done within such time as is *within the different sections of this act* limited, after his or her becoming of full age, sane, feme sole, or coming within this State." The language used in the seventh section is too plain and unequivocal to admit of a doubt that the legislature intended to exempt infants, insane persons, feme coverts, and non-residents, from the operation of

White v. Hight.

Felt v. Williams.

the act, until the removal of their respective disabilities, and the legislature are not without precedents of similar exceptions in other countries. The English statute of limitations contains a similar provision, and several of the States have copied it into their statutes.

The plea that the cause of action mentioned in the first count, did not accrue within sixteen years, is incorrectly pleaded. The limitation of sixteen years only applies to actions of debt and covenant, and to actions upon awards.

The court therefore are clearly of opinion that the court below erred in sustaining the demurrer to the plaintiff's replication. The judgment is reversed with costs, and the cause remanded to the Adams Circuit Court, with directions to overrule the demurrer, and proceed in the cause consistently with this opinion.

Judgment Reversed.

A. Williams, for plaintiff.

Browning, for defendant.

FELT v. WILLIAMS.

1 Scam. R., 206.

Error to Hancock.

1. *Detinue* is an unusual form of action.
2. The authorities furnish but few rules as to the evidence applicable to the declaration therein.
3. Great accuracy and certainty is demanded in describing the goods demanded in this action.
4. Where, in *detinue*, the declaration is for "a red cow with a white face," it is not supported by evidence that the cow in question was "sorrel or yellow."

LOCKWOOD, J.—This was an action of *detinue* brought in the Hancock Circuit Court by Williams against Felt, to recover a *large red cow with a white face*. On the trial of the cause, the plaintiff introduced a witness to prove property in the cow, who testified that the cow claimed by the plaintiff "was not a red cow, nor was she of such a color which he had ever heard anybody call red." The witness further stated that "the cow was a yellow or sorrel cow." This was all the testimony that the plaintiff gave respecting the description of the cow. The defendant below moved the court to instruct the jury to find a verdict for the defendant, as in case of a nonsuit, because of a discrepancy between the proof and the declaration, in respect to the color of the cow. This instruction the court refused to give, and this refusal is assigned for error.

The action of *detinue* is an unusual action, and the books furnish but few rules of evidence applicable to it. It is, however, laid down "That great certainty and accuracy in the description of the things

Felt v. Williams.

Stacker v. Wood.

demand, is still required in *detinue*, because the plaintiff may desire to recover the specific things themselves, which only can be done in this action." The same author says that less certainty of description of the goods in dispute, is required in trespass and trover, because in these actions the plaintiff only recovers damages, but in the action of *detinue* the judgment is to recover the identical thing itself, or the value, if it is not restored. There is no propriety in requiring great certainty and accuracy in the description of goods in this form of action, if the law does not also require that the proof shall correspond with equal certainty to the description of the goods given in the declaration. In this case there is such a manifest variance between the cow described in the declaration, and the one described by the witness, that the court ought to have rejected the testimony, as not tending to prove the issue between the parties. As all the proof on the subject of the identity of the cow is given in the bill of exceptions, and that being adjudged by this court insufficient to support the plaintiff's action, it is unnecessary to remand the cause, this court having power to give such judgment as the court below ought to have given.

Judgment reversed.

Walker, for plaintiff.

A. Williams and Browning, for defendant.

STACKER v. WOOD.

1 Scam. R., 207.

Error to Gallatin.

1. A note under the statute, which upon its face is expressed to have been given for value received, is *prima facie* evidence of a consideration.
2. Where the maker pleads "*no consideration*" to an action upon a note, the *onus probandi* lies upon him to sustain his plea.
3. *Poole v. Vanlandingham*. Breese R., 22—*overruled*.
4. A sealed instrument imports a consideration.
5. Case of a demurrer to evidence *ore tenus*.
6. Where the Supreme Court overrule a demurrer to evidence, they will render such a judgment as the inferior court ought to have rendered.

SMITH, J.—This was an action of *debt* on a note of hand. The declaration contains the usual count on a sealed instrument. The defendant pleaded that the note was given without any consideration whatever.

The plaintiffs took issue on this plea, and submitted both law and fact to the court for trial. On the trial, as shown by the bill of exceptions, the plaintiffs offered in evidence the note, which was under seal, and expressed to have been given for value received. To this

Stacker v. Wood.

evidence the defendant demurred *ore tenus*, and the Circuit Court adjudged the proof insufficient, and there being no other evidence offered, gave judgment for the defendant.

By the 12th section of the practice act, it is provided "That no person shall be permitted to deny, on the trial, the execution of any instrument in writing, whether sealed or not, upon which action may have been brought, unless the person so denying the same shall verify his plea by affidavit." This provision of the law made the mere production of the note evidence without proof of its execution; and, indeed, without the statute, it was already admitted by the defendant's plea of want of consideration.

It is equally certain that the production of evidence to support the plea of no consideration, being an affirmative plea, devolved on the defendant. There being no evidence in support of it, the court evidently erred in rendering judgment for the defendant. The position assumed by counsel, that the plea was the affirmation of the non-existence of a fact not susceptible of proof by the defendant, and that therefore the *onus probandi* to show the actual consideration of the note, ought to devolve on the plaintiffs, is not, we apprehend, by any means correct. The entire absence of a consideration for the execution of the note, would be a fact as completely within the means of proof by the defendant, as the plaintiffs' ability to show a consideration therefor. By the rule of the common law, the note being under seal imported a valuable consideration, and no inquiry could be had in relation thereto. So a note not under seal, expressing on its face to have been given for value received, imports a sufficient consideration, and leaves it open to be impeached by the defendant.

By the statute of this State relative to promissory notes, bonds, due bills, and other instruments in writing, making them assignable, approved 15th Feb., 1827, it is declared that such notes, bonds, due bills, and other instruments in writing whereby the maker agrees to pay any sum of money or article of personal property, or of money in personal property, shall be taken to be due and payable to the person to whom the same is made. This act of itself, then, would make any instrument, coming within the description named, *prima facie* evidence, although it did not express on its face to have been given for value received, and render the proof by the plaintiff of a consideration unnecessary. But it is considered well settled, and a principle admitting of no doubt, that the defendant by his plea was bound to sustain by proof, the existence of the fact averred in his plea, and upon which the plaintiffs had taken issue. This rule is laid down in a recent case decided in a sister State, *Mitchell v. Sheldon et al.* In that case, which

Stacker v. Wood.

Whitney v. Cochran.

is directly analogous to the present, the court say, the note is *prima facie* evidence of a consideration, and when a want of, or a failure of consideration, is relied on, it must be pleaded and proved.

The judgment of the Circuit Court is reversed, and the clerk of this court is directed to enter judgment for the plaintiffs in this court, for the amount of the note with interest thereon, at the rate of six per cent. damages from the 25th day of May, 1834, until the rendition of the judgment in this court, with costs of suit.

Judgment upon demurrer for plaintiff below.

Eddy, for plaintiffs.

Robinson, for defendant.



WHITNEY v. COCHRAN.

1 Scam. R., 209.

Error to Hancock.

1. A *parol* sale of land is only *voidable* under the statute of frauds, and not absolutely void.
2. A vendee in possession under a parol contract to purchase, who refuses to perform the contract, is a tenant of the vendor, liable for use and occupation, and estopped from denying his vendor's title.

SMITH, J.—This was an action of *ejectment*. On the trial of the cause the plaintiff offered in evidence a certificate of the register of the United States' Land Office at Springfield, showing the purchase of the tract of land in controversy, and also a deed for the same, which, owing to an alleged informality in the certificate of acknowledgment of the proof of the deed was rejected as evidence in the cause. The plaintiff then offered to prove a tenancy on the part of the defendants under the lessor of the plaintiff, and as an estoppel on the part of the defendants, to dispute the plaintiff's title, and offered to prove that the defendant, Cochran, purchased the land described in the declaration, by parol, from the lessor of the plaintiff, who, in like manner, by parol, had sold the same to the defendant, Felt, and that the defendants had respectively taken possession of the land under said purchases, before the date of the demise in plaintiff's declaration; to which the defendants objected; and the court sustained the objection, deciding that a parol sale of land was void, and could not create a tenancy; to which opinion the plaintiff by his counsel excepted.

The decision of the Circuit Court, that a parol purchase of land was absolutely void, is evidently founded on a misconception of the statute of frauds. Such a contract is only voidable under that statute, and not void in itself. The parties to a parol contract for the sale of land might surely consummate it at any time, and unless one of them

Whitney v. Cochran.

Morton v. Gateley.

Murry v. Crocker.

chose to interpose the statute, as a legal defence to an action for a refusal to consummate such an agreement, it would evidently be obligatory. The court ought also to have admitted the parol evidence of the contract, to establish the relation of landlord and tenant, because it cannot, we think, be denied, that in the case of a parol purchase of land, if the vendee enters into possession, and refuses afterward to affirm the contract, he would be liable to the vendor for use and occupation, and could not dispute his title by setting up an outstanding title in a third person.

*Judgment reversed.**Walker and Whitney, for plaintiff.**A. Williams, for defendant.*

MORTON v. GATELEY.

1 SCAM. R., 211.

Appeal from Coles.

1. THE Circuit Court may properly refuse to instruct the jury that there is *no evidence* to support the plaintiff's action.

2. What constitutes a copartnership?

3. Under what circumstances can one partner sue his copartner at law?

4. What constitutes a legitimate set-off?

5. *Quære?* Where A. B. and C. agree to do a particular piece of work for a stranger, each being entitled to payment for his *aliquot* share, does this constitute a technical copartnership?

*Judgment affirmed.**Pearson, for appellant.**Ficklin, for appellee.*

MURRY v. CROCKER.

1 SCAM. R., 212.

Error to St. Clair.

1. USURY must be pleaded, or the complaining party must *apply* to the court for relief in a formal manner.

2. The plaintiff cannot assign for error that which makes in his favor.

*Judgment affirmed.**Whitney, for plaintiff.**Cowles, for defendant.*

Morton v. Bailey.

The People v. Mobley.

MORTON v. BAILEY.

1 Scam. R., 213.

Appeal from Coles.

1. A DEFENDANT is not bound, when sued, to plead a set-off he has against the plaintiff.

2. The statute mode of collecting *costs* in a cause by *fee-bill* or execution is *cumulative*, and does not deprive the party entitled to them by the judgment of a court, of his common law remedy by action.

3. Where a defendant makes default, he is, as a general rule, *out of court*; but he may cross-examine the plaintiff's witnesses upon the inquisition or assessment of damages.

4. If the defendant is prejudiced by the action of the tribunal which assesses the damages, his remedy is to apply for a new inquest.

*Judgment affirmed.**Pearson*, for appellant.*Ficklin*, for appellee.

THE PEOPLE v. MOBLEY.

1 Scam. R., 215.

Appeal from Sangamon in a Quo Warranto proceeding.

1. UNDER the old Constitution of Illinois of August 26, 1818, a clerk appointed by the Supreme or Circuit Courts, held his office during *good behavior*, unless the legislature intervened, and by law, fixed the term of office.

2. The power of either court to appoint its clerk, depends upon the fact whether the office is *vacant* at the time the appointment is made.

3. The judges of either court have power in *vacation* to appoint a clerk, *if the office is vacant*.

4. The legislature having the power to create, have also the power to abolish inferior courts.

5. A clerk cannot be removed, unless for the causes prescribed by law.

*Judgment reversed.**Douglas*, *Walker*, and *W. Thomas*, for appellants.*Eddy*, and *J. B. Thomas*, for appellee.

Clark v. Lake.

Marshall v. Maury.

CLARK v. LAKE.

1 Scam. R., 229.

Error to Sangamon.

1. THE legislature have power to declare what rivers of the State shall be public highways.

2. The river Sangamon is a public highway.

3. Case lies for the obstruction of a public highway, at the suit of one who is injured thereby.

4. It is no defence to show, in such an action, that in navigating a river which is declared to be a public highway, the plaintiff would encounter other obstructions lower down the stream, even if he could overcome the obstruction erected in the river by the defendant.

5. The question as to whether evidence is relevant or not, depends upon the fact, whether it tends to prove the issue joined between the parties to the record.

Judgment reversed.

C. Walker, for plaintiff.

Stuart and McConnel, for defendant.



MARSHALL v. MAURY.

1 Scam. R., 231.

Appeal from Schuyler.

1. A WRIT of *sci. fa.* to foreclose a mortgage is a declaration of the plaintiff, as well as the process of the court.

2. If a *sci. fa.* is defective, the mode of reaching the defect is by demurrer, and not a motion to quash.

3. A rule to plead is not necessary in any case; the law fixes the rule day, and all suitors must take notice of it at their peril.

4. A *sci. fa.* to foreclose a mortgage is assimilated to a proceeding *in rem*, and the judgment should describe the premises, and award a special execution for their sale.

5. A simple direction, that the clerk issue "a special execution according to the form of the statute, etc.," is illegal.

Judgment reversed.

Walker and Maxwell, for appellant.

Browning, for appellee.

Vanlandingham v. Fellows.

Bustard v. Morrison.

VANLANDINGHAM v. FELLOWS.

1 Scam. R., 233.

Error to Gallatin.

1. A WRIT of inquiry to assess damages upon a default, may be executed in term time in the presence of the court, or in vacation before the sheriff and a jury.

2. If executed in vacation, it may take place in any part of the sheriff's *bailiwick*.

3. If any irregularity or error occurs in the execution of the inquiry, the remedy is by motion to set it aside.

4. The reasons for a motion are no part of the record, unless embodied in a bill of exceptions.

Judgment affirmed.

Gatewood and Robinson, for plaintiff.

Eddy, for defendants.



BUSTARD v. MORRISON.

1 Scam. R., 235.

Error to Randolph.

1. Judgment liens will not ordinarily be enforced in equity.
2. Judgment liens are co-extensive with the territorial jurisdiction of the court in which the judgment was pronounced.
3. After judgment, a sale of land upon which the lien attaches, by the debtor, cannot defeat the force of the lien.
4. A judgment lien may be lost by the laches of the plaintiff.
5. The lien of a judgment does not extend beyond the county in which the court exercised its jurisdiction.

WILSON, C. J.—The material facts set out in the complainant's bill, are, that in 1821 they obtained a judgment in the Randolph Circuit Court against J. Edgar, for \$829; that in 1823, an execution issued on this judgment, which was replevied with R. Morrison as surety. Other executions afterward issued, which were returned unsatisfied. The bill further sets out that Edgar died insolvent, but that at the time of the rendition of the judgment, he was the owner of lands in the counties of Randolph, Jackson, and Perry, all of which were sold to persons who are made defendants to the bill of complaint, subject, however, to the judgment of the complainants; and concludes with a prayer that the lien may be perpetual, and the land sold to satisfy their judgment.

To this bill the defendants demurred; the court sustained the demurrer; and the decision of the court sustaining the demurrer, is the error assigned for the reversal of the judgment below.

Bustard v. Morrison.

Robinson v. Harlan.

It is clear that the complainants have mistaken their remedy, and the effect of their judgment. It is not the province of a court of chancery to carry into effect the judgments of a court of law. The powers of a court of law are amply sufficient to carry into effect its own adjudications. The statute makes judgments of the Circuit Court a lien upon all the lands of the defendant within its jurisdiction. No sale or transfer of those lands after judgment will exempt them from the operation of an execution at any time within seven years, since the act of 1825. In this case, according to the complainants' own showing, the lands were sold subject to their judgment. The party, then, have mistaken their remedy, in applying to a court of chancery to enforce their judgment, instead of availing themselves of the process of the court by which it was rendered. If, by the lapse of time, and their own laches, they have lost their lien, a court of chancery cannot aid them, by extending the lien beyond the period limited by law; neither can it make the judgment of the Randolph Circuit Court a lien upon the land lying in the counties of Jackson and Perry. The judgment of a circuit court creates no lien upon land beyond the limit of its jurisdiction, to wit, the county in which such judgment is rendered.

Decree affirmed.

Semple, for plaintiffs.

D. J. Baker, for defendants.



ROBINSON v. HARLAN.

1 Scam. R., 237.

Appeal from Wayne.

1. The jurisdiction of a justice of the peace is limited by the statute as to person, sum, place and process.
2. Where a justice has no jurisdiction, his acts are void, and afford no justification to a constable who executes process issued upon the illegal judgment.
3. *Case* lies against a constable who neglects or refuses to execute legal process placed in his hands for execution.
4. The declaration against a constable for such neglect or refusal must aver the facts which show jurisdiction in the justice who issued the process.

WILSON, C. J.—This was an action of *trespass on the case*, brought by Robinson against Harlan, as constable, for neglecting and refusing to execute process issued by a justice of the peace, upon a judgment rendered by the justice in favor of the plaintiff, against John B. Gash. The declaration alleges that the judgment was rendered, and an execution first issued and put into the hands of Harlan, as constable, upon which he returned “no property found;” after which a

capias was issued and returned by Harlan "not found." It then charges that upon the execution the constable might have made the money, and that with the *capias* he might have taken the body of Gash, but that he refused and neglected to do either, to the damage of the plaintiff \$200. To this declaration the defendant interposed a demurrer, which was sustained by the court.

It cannot be denied that a constable is liable where he has willfully neglected or refused to execute lawful process issued upon a judgment rendered by a justice in a case where he had jurisdiction of the subject matter litigated; but to enforce this liability, it is not only necessary for the declaration to allege generally that the magistrate had jurisdiction, but it should set out specifically the kind of action, and extent of the plaintiff's claim, in order to show to the court that the justice had jurisdiction.

The declaration in this case is essentially defective in this respect; it does not set out the cause of action, or contain even a general allegation of the justice's jurisdiction. The reason of this rule is obvious. By adverting to the organization and powers of a justice's court, it will be perceived that it is one of limited jurisdiction. The statute is the charter of its authority; and whenever it assumes jurisdiction in a case not conferred by the statute, its acts are null and void, and the officer obeying its process in such a case, makes himself liable. It is therefore incumbent upon a ministerial officer to look to the jurisdiction of the court, but he is bound to look no further. Its process is a sufficient warrant to him for what it may command, however erroneous the judgment upon which it issued, provided it did not exceed the limits of its jurisdiction as to the subject matter of adjudication.

For anything that appears from the plaintiff's declaration in this case, the action before the justice may have been for slander, or some other matter not cognizable before a justice, and if so, the constable was not bound to execute the execution or *capias*. The defendant's demurrer to the plaintiff's declaration, was therefore properly sustained by the Circuit Court, and the judgment is affirmed with costs.

Judgment affirmed.

Pearson, for appellant.

Ficklin, for appellee.

Hannum v. Thompson. Ogle v. Coffey. Bently v. Doe. Vanlandingham v. Lowery.

HANNUM v. THOMPSON.

1 Scam. R., 238.

Appeal from Putnam.

A SUMMONS issuing out of the Circuit Court, to which the *seal* of that court is not affixed, is irregular, and should be quashed on motion. *Judgment reversed.*

Eddy, for appellant.

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OGLE v. COFFEY.

1 Scam. R., 239.

Error to Madison.

1. A SHERIFF's return to original process should show *when* it was served.

2. Such return must show *how* it was served.

Judgment reversed.

J. B. Thomas and *D. Prickett*, for plaintiff.

Semple, for defendant.

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BENTLY v. DOE.

1 Scam. R., 240.

Error to Morgan.

A JUDGMENT in *ejectment* should describe the premises, when for the plaintiff, as specifically as the declaration.

Judgment reversed.

McConnell, for plaintiff.

W. Thomas, for defendant.

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VANLANDINGHAM v. LOWERY.

1 Scam. R., 240.

Appeal from Gallatin.

1. WHERE an action pending in the Circuit Court is referred to arbitrators for decision, and their award is reported to the court for judgment according to the statute, the court will presume that the proceedings of the arbitrators were in conformity with the law.

2. If illegal, the defeated party must point out the irregularity by affidavit. *Judgment affirmed.*

Eddy, for appellant.

D. J. Baker, for appellee.

REAVIS v. REAVIS.

1 Scam. R., 298.

Error to Bond.

BILL by wife for a divorce, alleging the willful desertion of the husband, and his continued absence from her, for the space of two years, prior to the filing of the bill; trial and verdict for wife, upon bill, answer, and testimony; decree awarding alimony, and cause continued. At the next term the question of alimony was heard, an order made for one cent alimony. The evidence used upon the trial for a divorce was used in ascertaining the question of alimony. *Held*, that the *second order* was illegal.

SMITH, J.—This was a proceeding in *equity* under the statute for a divorce, for willful and continued desertion of the wife of complainant. The defendant answered the bill admitting the desertion, but alleging as a justification therefor, the extreme and repeated cruelty, and the absence of the complainant, and his refusal to protect her from the gross and brutal insults of others in his presence. The facts were inquired into by a jury, and the jury found a verdict in favor of the complainant, sustaining the charge of desertion; upon which the Circuit Court entered up the following decree. “Ordered, that the bands of matrimony heretofore existing in this cause, between the complainant and respondent, be dissolved, and that alimony be allowed to the respondent for her maintenance, and that of her child the issue of said marriage, and that the amount so to be allowed, be inquired of by evidence to be heard at the next term, until which time the cause is continued.”

At the next term the Circuit Court entered up judgment in the cause for one cent alimony, and decreed that defendant should pay her proportion of the costs on the hearing of the application.

The defendant brought the cause to this court, and now assigns for error.

1st. That the court erred in allowing nominal alimony, when it was shown that the complainant, at the time, was possessed of large real and personal estate.

2d. That the court erred in admitting the same testimony which had been heard on the previous issue of divorce, or suit, at a term subsequent to the time when the jury found the issue, against the objections of the defendant.

3d. That the court decided that respondent should pay costs.

In deciding upon the grounds of error, it will be proper to look to the decree made in the cause, at the term when the bands of matrimony were dissolved. By the order, the Circuit Court doubtless found itself compelled to award the order for the dissolution of the bands of matrimony; the jury found the fact of willful and continued desertion; but at the same time, it appears that it felt itself equally bound to order that sufficient alimony should be awarded to the

respondent for her support, and that of her infant child, the issue of the marriage ; but deferred the inquiry therein until the next term, when the amount was to be determined by evidence.

This order was doubtless also made in pursuance of the provisions of the 6th section of the act concerning divorces, approved 31st January, 1827, which declares "That when a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care, custody, and support of the children, or any of them, as from the circumstances of the parties, and the nature of the case, shall be fit, reasonable, and just. And in case the wife is complainant, to order the defendant to give reasonable security for the performance of such order ; and may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, as shall appear reasonable and proper."

From the bill of exceptions it appears that the complainant was the owner of considerable real and personal estate, as was proved on the hearing ; but it also appears that on this inquiry the Circuit Court permitted the complainant to introduce the same witnesses and prove the same facts which had formerly been proved on the trial of the issue for a divorce, to which the respondent objected and excepted to the opinion of the court in admitting such testimony.

The first inquiry presented on examining the grounds of error assigned, seems naturally to be, what had the Circuit Court decided, on making the order for the dissolution of the bands of matrimony, and decreeing alimony ? Must it not have been that although the marriage was dissolved, still under the provisions of the law, the wife was entitled to a fair and reasonable allowance for the support of herself and child ; and that as it had not then evidence by which it could judge of the means and ability of the complainant to afford such support, the cause was continued to the next term, for the production of such evidence ? It had heard the merits of complainant's prayer, and on the trial had heard the whole grounds of the causes of complaint, and of attempted justification for the abandonment charged and not denied ; and with the full knowledge necessarily of the whole grounds occupied by the parties, had come to the determination, that although the complainant was entitled to the relief prayed, yet equally so, the wife and child were entitled to a support, which it adjudged the complainant should pay. If this view of the cause thus far, be just, and to it no objection is perceived, then it would seem to follow as a necessary consequence, that the only subject of inquiry, was the condition of the parties in life, and the means and ability of the com-

plainant to pay such allowance as the court should consider fit, reasonable, and just, and that evidence foreign to such inquiry should be rejected.

It will be perceived that in determining that alimony should be allowed, the court had necessarily passed on the conduct of the wife, and had by such order necessarily decided that she had not, let her conduct have been what it might, forfeited her right to that protection and support which the law allowed, and which the court had most undoubtedly considered her entitled to; but the measure or extent of the allowance was to be ascertained by evidence of the capacity of the complainant to answer.

The testimony, then, which was admitted relating to the original grounds of divorce, and which had been given on the issue of desertion, must have been irrelevant to an inquiry on the question of allowance of alimony. It must, I again repeat, be borne in mind, that the conduct of the wife had already been placed before the court on the first inquiry before the court and jury, and could not have been the subject of a second inquiry, because it was by no means necessary to a decision of the question as to the allowance of alimony. What would be a proper allowance to a person in her situation in life, and how much it would take to afford her and her child a reasonable support, and the ability of the complainant to pay that sum, or as near to it as his means would enable him, were surely the only questions in a case like the present. The amount to enable her to procure the necessary food and clothing for her child, could not be made to depend on her previous conduct, after it had been decided, that to such support and clothing she was entitled; for that would be, to make the amount of the necessities of life requisite for her support depend on her personal conduct before the dissolution of the marriage, and not to the extent of those means indispensable for existence. Whether this view be correct or not, still there is a reason equally forcible, indeed more so, which shows the injustice of the admission of the testimony objected to.

I think it but rational to suppose that the introduction of the evidence was not only calculated to take the party by surprise, but that it must have had that effect. In an inquiry of the kind, could it have occurred to the party that all the former causes of complaint were to be again heard? I should greatly doubt whether the most intelligent mind would have supposed that the desertion, with all the accompanying acts, would be again a matter of investigation and decision. If not, how would the party be prepared to introduce rebutting and explanatory testimony? And would not the introduc-

tion of such evidence, uncontradicted and unexplained, have had a most unfavorable effect on the mind of the judge deciding the case of alimony, if he had never heard the whole evidence on the trial before the court and jury, for the divorce, as seems to have been the fact in the present case? Its consequences cannot be calculated, and it must be owing to this cause that the order for an allowance of one cent was made; it can in my judgment be accounted for from no other cause. It is not intended to say that the whole conduct of the wife, is not to be taken into consideration on determining the question of an allowance of alimony, but I intend to say, that when that conduct has once been the subject of an examination, and an order made to merely ascertain the condition of the husband and his pecuniary ability to afford the wife a maintenance, it is erroneous and improper to receive again testimony which necessarily must be in the nature of *ex parte* proof. Suppose the court had ordered a master to have reported the amount of the complainant's real and personal estate, would he have for a moment felt himself justified in receiving evidence that the wife had deserted, or done any other act charged in the bill? Unquestionably not; and yet this interlocutory order of the Circuit Court meant no more, in my judgment, than such an order. Shall, then, the modes of arriving at the intended result, change the character of the evidence to be adduced? It cannot be; and hence, I arrive at the conclusion that it was improperly received. But is there nothing in this nominal allowance of alimony, which at once shows that it was a virtual rescinding of the judgment of the Circuit Court? Did the Circuit Court, when it made that order, intend to keep the word of promise to the respondent's ear, and break it to her hopes? Did it intend to trifle with the justice and equity of the laws of the country, and make its own decrees a mere phantom, which should elude the grasp of the respondent, and prove an idle and delusive dream? If words are not mere empty sounds, if they mean anything, then surely in the words of the decree, the respondent was to be allowed a sum sufficient for the support and maintenance of herself and child, if on proof of the ability of the complainant, he had the property out of which such an allowance as was fit, reasonable, and just, could be made. That he had such means abundantly appears from the proof, and why that allowance was not made, can only be inferred from the introduction of the testimony objected to by the respondent. This order allowing one cent, is most unjust in its consequences, because it deprives the infant child of the protection and nurture intended to be given under the decree. This part of the case must certainly have escaped the observation of the court, or it would not certainly, I pre-

sume, have made an order, from which such consequences must inevitably flow. The order, then, for this reason alone, was an entire departure from the former adjudication of the court, and directly repugnant thereto, and necessarily annulled, for every practical purpose, the judgment of the court. The order decreeing costs against the wife, was also clearly erroneous. I can see no view in which the case can be examined, that does not show the entire incorrectness of the final judgment on the allowance of alimony. It should have been a yearly allowance commensurate to the support of the wife and child, in proportion to the ability of the husband and her condition in life; what that ability and condition might be, would be subject of inquiry by evidence, and when ascertained, should be so declared.

I am of opinion that the decree of the Circuit Court should be reversed with costs, and the cause remanded to that court with instructions to proceed in the cause, and allow yearly such alimony for the support of the respondent and her child, as shall, from the evidence to be adduced, and the circumstances of the parties, be fit, reasonable, and just.

Decree reversed.

Semple and Cowles, for plaintiff.

Snyder and Whitney, for defendant.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN JUNE TERM, 1836, AT VANDALIA.

LEIGH *v.* MASON.

1 Scam. R., 249.

Appeal from Macoupin.

1. A JUSTICE has no jurisdiction in a suit, where an administrator is a party, and the demand exceeds \$20, unless for the purchase money due at an administrator's sale.

2. Where a justice has no jurisdiction of the subject matter of an action, consent of parties cannot confer it.

Judgment reversed.

Field, for appellant.

Eddy and *Sawyer*, for appellees.

EASTON *v.* ALTUM.

1 Scam. R., 250.

Error to Clinton.

1. AN unsealed process is void.

2. Whether a summons is void or merely voidable, is a matter of no moment, if the parties appear and plead without objecting to the irregularity.

Judgment affirmed.

Cowles, for plaintiff.

Eddy, for defendant.

Gilmore v. Ballard.

Whitney v. Turner.

Dedman v. Barber.

Foster v. Filley.

GILMORE v. BALLARD.

1 SCAM. R., 252.

Error to Clay.

1. WHERE the parties waive a jury, and try the questions of law and fact by the court, a bill of exceptions will not lie to the decision.

2. If the evidence adduced before the court is insufficient to entitle the plaintiff to recover, the defendant should either demur to the evidence or move the court to nonsuit the plaintiff.

Judgment affirmed.

Davis and Forman, for plaintiff.



WHITNEY v. TURNER.

1 SCAM. R., 253.

Error to Adams.

IN trespass all of the *actors* and *accessories* before the fact are *principals*.

Judgment affirmed.

Whitney, pro se, for plaintiff.



DEDMAN v. BARBER.

1 SCAM. R., 254.

Appeal from Hancock.

1. THE policy of our law is to try causes before justices of the peace upon their merits, and the appellate courts will not tolerate technical objections upon the hearing of an appeal from their judgments.

2. Where an appeal bond entered into before a justice is informal, the appellant may file a new bond.

Judgment reversed.

Whitney, Davis, and Forman, for appellants.

Sawyer, for appellee.



FOSTER v. FILLEY.

1 SCAM. R., 256.

Error to Madison.

WHERE a defendant agrees that unless he files his plea by a given day, the plaintiff may take judgment—a default after the expiration of the stipulated time is regular.

Judgment affirmed.

Cowles, Davis, and Krum, for plaintiff.

Scates, for defendant.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1836, AT VANDALIA.

THE PEOPLE *v.* DILL.

1 Scam. R., 257.

Error to Edgar.

IN criminal causes the people cannot prosecute a writ of error ; because the accused would be placed in jeopardy the second time for the same offence.

Writ of Error dismissed.

Ficklin, State attorney, and *Scates*, attorney-general,
for plaintiffs.

Pearson, for defendant.

BOON *v.* JULIET.

1 Scam. R., 258.

Appeal from Jackson.

1. By the Constitution of Illinois, of 1818, the descendants of registered slaves born after the 26th day of August, 1818, became free.
2. Where a judgment is rendered for the plaintiff upon demurrer to an insufficient plea, the plaintiff has his election to take a judgment for nominal damages, or have a writ of inquiry.

SMITH, J.—This was an action of *trespass vi et armis* brought by the appellee against the appellant, for an assault and battery on her sons, Peter, Harrison, and Enoch, being her servants, and restraining them of their liberty, *per quod servitium amisit*.

The defendant in the Circuit Court, Boon, pleaded specially, that

one Gaston removed into this State, while it was a part of the Territory of Indiana, and brought with him Juliet, being the owner of her, then aged about nine years; and did on the 20th of July, 1808, register her name and age with Robert Morrison, clerk of the Court of Common Pleas of Randolph county, in said Territory, agreeably to the law of the Territory, entitled "*An act for the introduction of Negroes and Mulattoes into the said Territory*," passed Sept. 17th, 1807; That the said Gaston on the 13th of July, 1819, transferred the said Juliet, according to the laws of the Territory, to one Alexander Gaston, jr., by bill of sale;—That on the 7th of October, 1819, Alexander Gaston, Jr., transferred her in like manner to one W. Boon, defendant's intestate. That said Peter, Harrison, and Enoch, are Juliet's children. That Enoch is twelve years and five months of age, born since the adoption of the Constitution. Peter twenty-two, and Harrison twenty years of age, the two latter born before the adoption of the Constitution. The defendant, as Wm. Boon's administrator, entered plaintiff's close, and took said children, and detained them as part of his goods and chattels, which are the supposed trespasses, force, and injury in the plaintiff's declaration mentioned. To this plea the plaintiff demurred, and the defendant joined. The Circuit Court gave judgment on the demurrer for the plaintiff, and one cent in damages. The judgment on the demurrer is assigned in this court for error.

This action was confessedly instituted to ascertain the right of the children named in the declaration, to freedom. We apprehend that the correctness of the decision of the Circuit Court is to be tested by the solution of the proposition, whether the children of registered mulatto or negro servants, recognized by the laws of the Territories of Indiana and Illinois, or either of them, while such Territories were in being; and the 3d section of the 6th Article of the Constitution of this State, can be, by virtue of those laws, and that section of the Constitution, held for any period of time whatever, in servitude. In order to arrive at this solution, it is necessary to ascertain what were the character and extent of the legislation of the Territories of Indiana and Illinois on this subject. It appears that while this portion of the country formed a component part of the then Territory of Indiana, on the 17th of Sept., 1807, the legislature of the Territory, adopted a law entitled "*An act concerning the introduction of Mulattoes and Negroes into this Territory*." By the first section of this act, it authorized the "Owner of any negroes or mulattoes, of and above the age of fifteen years, and owing service and labor as slaves in any of the States or Territories of the United States, to bring the said negroes or mulattoes into this Territory." The second section of this act pro-

vided that the slave might agree with the owner, before the clerk of the Court of Common Pleas of the county in which the parties were, for the number of years which the slave would serve his owner, and the clerk was required to make a record of such agreement.

The third section provided for the removal of the slave in case of refusal to serve, at any time within sixty days thereafter. The fifth section declares, that any person removing into this Territory, and being the owner or possessor of any negro or mulatto as aforesaid, under the age of fifteen years, or if any person shall hereafter acquire a property in any negro or mulatto under the age aforesaid, and who shall bring them into this Territory, it shall and may be lawful for such person, owner or possessor, to hold the said negro or mulatto to service or labor, the males until they arrive at the age of thirty-five, and females until they arrive at the age of thirty-two years. The sixth section provides, that any person removing any negro or mulatto into this Territory, under the authority of the preceding sections, it shall be incumbent on such person, within thirty days thereafter, to register the name and age of such negro or mulatto, with the clerk of the Court of Common Pleas for the proper county. By the 13th section of the same act, it was further provided that the children, born in said Territory, of a parent of color, owing service or labor by *indenture* according to law, should serve the master, and such negroes or mulattoes shall become free; the males at the age of twenty-one years, and the females at the age of eighteen years,"—may be considered as referring to the registered negroes and mulattoes named in the antecedent sentence of the paragraph; but when it is remembered that a proviso is intended to qualify what is affirmed in the body of an act, section, or paragraph preceding it, we discover that it was intended by the framers of the Constitution as a limitation on a supposed preëxisting right of the master to the service of the children of registered servants for a greater period of time, and designed as an exception in favor of such children, founded, it is true, on the mistaken supposition that, under the Territorial laws, they had been subjected to a greater period of service; and not as creating the liability to service, and rendering a class of persons evidently free at their birth, the subjects of a laborious and extended period of servitude. It is most manifest that this proviso was framed under such a view, and intended as a mere limitation on the imagined right of the master to the service of the children. As no such right existed at the formation and adoption of the Constitution, and as the proviso must be considered as an act intended for the benefit of, and enlarging the right of a class of persons supposed to have been subjected to a period of

Boon v. Juliet.

Duncan v. State Bank of Illinois.

Yunt v. Brown.

servitude, when in truth and in fact, none such could be legally considered to exist, I am clearly of opinion, that the children of registered negroes and mulattoes, under the laws of the Territories of Indiana and Illinois, are unquestionably free, and that the defendant's plea was insufficient to bar the plaintiff's action. It is also to be remarked that Peter and Harrison, two of the children, were born before the adoption of the Constitution, and are necessarily excluded from the terms of the 8th section of the 6th Article; and it is not pretended that any law of the Territory rendered them in any manner, whatever, liable to serve the owner of their mother. The demurrer to such plea was rightly sustained.

An objection is raised to the judgment for nominal damages.

The plaintiff might have had an inquest to ascertain the damages; but we have no doubt he might waive this, and take judgment for nominal damages.

Judgment affirmed.

Shields, for appellant.

Eddy and *D. J. Baker*, for appellee.



DUNCAN v. STATE BANK OF ILLINOIS.

1 SCAM. R., 262.

Error to Jackson.

1. A DEFENDANT who is in court, cannot cause the dismissal of a bill in equity as to his co-defendants who have not appeared or been served with process.

2. The old State Bank is not liable for costs.

Decree reversed.

Scates, for plaintiffs.

Semple, for defendants.



YUNT v. BROWN.

1 SCAM. R., 264.

Error to Fulton.

1. A *certiorari* to remove a cause from a justice of the peace into the Circuit Court, lies only where an appeal is allowed by law in such a case.

●Yunt v. Brown.

Carver v. Crocker.

2. Where a statute prohibits an appeal, a *certiorari* will not be sustained.

Judgment reversed.

Ford and Cavalry, for plaintiff.

A. Williams, for defendant.

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CARVER v. CROCKER.

1 Scam. R., 265.

Appeal from Cook.

1. Where a statute provides that in a suit before a justice of the peace to recover upon a demand, or make defence upon a discount or set-off, and neither party can prove his demand, discount or set-off by a witness, he may compel his adversary to be sworn, if present, upon the trial, otherwise notice shall be given him.
2. In such case, notice to the attorney of the party is insufficient.
3. The rules of evidence are the same upon the trial of an appeal in the Circuit Court, as the law prescribes in a trial before the justice of the peace.

LOCKWOOD, J.—This action was originally commenced before a justice of the peace, and judgment given for Crocker, the plaintiff, against Carver, by default, on a promissory note. It was appealed to the Circuit Court of Cook county, by Carver, and the day before the trial in the Circuit Court, Carver served a notice on the attorney of Crocker, "That the defendant had no means of proving his off-set to the demand of the plaintiff, except by the oath of one of the parties." On the trial in the Circuit Court, Carver offered to be sworn, whose evidence was rejected, on the ground that the plaintiff below was absent and a non-resident of the State.

The only question necessary for this court to decide, is, whether the notice served on Crocker's attorney was sufficient to allow Carver to be sworn. By the 5th section of the "*Act to amend an act concerning Justices of the Peace and Constables*," approved February 13, 1827, either party who has no witness to prove his demand, discount, or set-off, may be permitted to prove the same by the testimony of the adverse party, or in case of his absence or refusal to be sworn, by his own oath, "*Provided*, that no person shall be allowed to prove his demand, discount or off-set, unless the adverse party be present, or shall have been notified thereof, and for which purpose the justice may continue the cause for such time as may be necessary." By the 6th section of the act, it is further declared that "Upon trials of appeals in the Circuit Court, the same rules of evidence shall be observed as in trials before justices of the peace." The letter as well as the spirit of these sections of the act, are that the party litigant, and not his attorney, must be notified, in order that he may elect whether to be sworn himself, or suffer the adverse party to be sworn. The

Caryer v. Crocker.

Pearce v. Swan.

attorney could not give the evidence contemplated by the act. If an attorney knew the facts which the opposite party desired to prove, he could be made a witness, and no notice would be necessary. That the act did not contemplate that the notice to the attorney would be sufficient, is evident from the consideration that the statute authorizes the justice to continue the cause for such time as may be necessary to give the notice. If the notice to an attorney was sufficient, this provision to continue the cause was idle; for the plaintiff is always in court, either in person, or by attorney, or his cause would be discontinued. The defendant ought to have obtained a continuance of the cause, to enable him to serve his notice on the plaintiff personally. The Circuit Court decided correctly in refusing to permit the defendant to be sworn.

Judgment affirmed.

Curtis and Stuart, for appellant.

Spring, for appellee.



PEARCE v. SWAN.

1 SCAM. R., 266.

Error to Gallatin.

1. A NOTICE, to try the right of property, under the statute of July 29, 1827, need not state the names of the plaintiffs in execution.

2. If it undertakes to do so, and fails to recite them correctly, this misrecital will not affect the legality of the notice.

3. Surplusage will not vitiate a statutory notice.

4. Where a stranger claims goods and chattels levied upon, under an execution, a notice which makes known his claim, forbids the sale and informs the officer that he intends to prosecute and establish his rights, is sufficient.

5. If such a notice is insufficient, the objection being in the nature of a plea in abatement, must be made at the earliest moment before trial.

6. A dilatory motion or plea which is made for the first time in the appellate court will not be regarded.

7. In a trial of the right of property an appeal must, under the act of July 29, 1827, be perfected by the executing of a bond, on the day of the rendition of the verdict complained of.

8. If an appeal is irregular, and yet the appellee appears in the superior court and tries the appeal without objection, he waives the irregularity.

Pearce *v.* Swan.Marston *v.* Wilcox.Leidig *v.* Rawson.

9. An appeal is a continuation of the suit.
10. An appeal suspends the proceedings of the inferior court.
11. Consent will confer jurisdiction over the parties to an appeal, where the subject matter of the appeal is within the jurisdiction of the appellate court.
12. A verdict and judgment must be construed together, when the latter is ambiguous or uncertain.

*Judgment affirmed.**Robinson*, for plaintiffs.*Eddy*, for defendant.MARSTON *v.* WILCOX.

1 Scam. R., 270.

Appeal from Hancock.

1. A RECEIPT for the payment of money on delivery of property is *prima facie* evidence of the facts therein recited. It may be explained by parol evidence, but in the absence of such explanation it will be treated as *conclusive* upon the *signer*.
2. While it is true as a general principle, that a party may sue at any time within the period fixed by the statute of limitations for the commencement of an action, consulting his own convenience as to when he will assert his rights; yet in the case of *stale* demands, and in doubtful cases, lapse of time is entitled to great consideration.
3. Where a creditor fraudulently procures a grant of administration upon the estate of his debtor, which is afterward revoked for the fraud, no intendments will be indulged in to support an action upon his demand.
4. A vague admission cannot be relied upon as evidence.
5. Where a party tampers with a witness and undertakes to refresh his memory the circumstance is, to say the least, suspicious.

*Judgment reversed.**A. Williams*, for appellant.*Ford* and *Whitney*, for appellee.LEIDIG *v.* RAWSON.

1 Scam. R., 272.

Appeal from Montgomery.

1. To sustain an action for malicious prosecution, malice on the part of the defendant, and a want of probable cause must both exist,

Leidig v. Rawson.

Jones v. Bramblet.

and evidence tending to prove the want or existence of either is admissible.

2. The defendant may show in bar of the action that he acted in good faith; that he had probable cause for prosecuting the plaintiff.

3. Suspicion based upon reasonable grounds is admissible in justification of a suit for malicious prosecution.

4. Where a record or written instrument is not the foundation of the action, but is introduced collaterally as matter of inducement, variances are disregarded unless the discrepancy is so great as to destroy the identity of the record or document.

5. On a question of intent the understanding of a witness is inadmissible.

6. A defendant, in case for malicious prosecution, is not to be deprived of his defence of probable cause, by reason of the ignorance of the justice of the peace, or the blunders of a grand jury or States attorney as to the technical designation of the crime which gave rise to the charge and action, provided the defendant acted in good faith.

7. It does not follow that because a plaintiff, in an action for malicious prosecution, was acquitted of the crime, that the defendant is liable in damages.

Judgment reversed.

Cowles and Semple, for appellant.

Eddy, Greathouse and Sawyer, for appellee.

JONES v. BRAMBLET.

1 Scam. R., 276.

Appeal from Gallatin.

1. Where A. devises land to B. on a condition, the performance of which depends upon the act of C., and the latter voluntarily dispenses with the requirement of the condition, the estate devised absolutely vests in B., upon proof of the dispensation. And any evidence of the acts or declarations of C. which tend to establish the excuse for non-compliance by B. with the letter of the condition is admissible in evidence.
2. The declarations and acts of third persons are not admissible in evidence.
3. The intention of a testator is to be followed in the construction of his will.
4. Where a devise is upon a condition, which, after the death of the deviser, becomes impossible of performance, the estate absolutely vests in the devisee, discharged of the condition.
5. Words of inheritance are essential in order to pass a fee by conveyance or devise.
6. In the absence of words of perpetuity, a devisee takes a life estate only.
7. Where A. devises the same land, by the same will, to both B. and C., the first devise being in fee, and the second for life, the two devises are not inconsistent; C. takes a life estate, and the reversion goes to B. or his heirs upon the death of C.

SMITH, J.—This was an action of *ejectment* to recover the possession of the S. E. qr. of Section 14, in T. 8, S. R. 6 East. The lessors of the plaintiff claimed the land under the will of John Brown, who

devised the lands named in his said will, as follows, viz.: "First I give and bequeath to my well beloved wife, Sarah, the following quarter section of land, viz.; the Southeast quarter of Section Eleven, in Township 8, South of Range 6 East. Also the Southeast quarter of Section Fourteen, in Township 8, South of Range 4 East, in the lands sold at Shawneetown, for her to have the benefit and profit of the farms and improvements that are on both quarter sections, during her natural life; and at her death to descend to her heirs, except the Southeast quarter of Section Fourteen, which is given equally to two infant children that are now living with us, named and called Nancy Bramblet and Betsey Bramblet, daughters of Benjamin and Polly Bramblet. This land is given to the aforesaid Nancy and Betsey, if they should continue to live with my wife, and are bound to her and continue to live with her until married. And further, should both or either of them marry with my wife's consent, they are authorized to settle and improve on the aforesaid Southeast quarter of Section Fourteen; but my wife is to have the benefit of the present improvements during her natural life." The defendant claimed title under the recited clause in the will, and this portion of the will is all that the respective parties assert their claims under. The jury found a verdict for the lessors of the plaintiff.

The defendants in the court below, assign for error the following causes:

1. That the Circuit Court admitted improper parol testimony to go to the jury, on the part of the plaintiff's lessors.
2. That it rejected proper parol evidence offered on the part of the defendants.
3. That the verdict of the jury was contrary to law and the evidence.

The points made will be considered in the order they are stated. It appears from the evidence embodied in the bill of exceptions, that the will of the testator was executed on the 1st of March, 1830; and that he died on the 12th day of the same month; that his wife, Sarah Brown, was feeble and infirm, and died in May, 1832. That the lessors of the plaintiff offered in evidence the declaration of Sarah Brown, as to her inability to receive and take charge of them, and did not desire to have them; and of her removal to Kentucky without them, where she died. That the lessors were at the time infants of tender age, not more than 8 or 9 years old. This is the substance of the testimony objected to under the first point as inadmissible. There can be no doubt that the testimony was proper to show that that portion of the will which made the estate, created in the lessors of the

plaintiff, depend on the condition of their living with Sarah Brown, and being bound to her, had been dispensed with by Sarah Brown; and therefore the performance of those acts as conditions precedent to their taking the estate, was by no means necessary to the perfection of such estate.

On the second point made, the offer to give in evidence the declaration and acts of Nancy Brown, that the children should not live with, or be bound to, Sarah Brown, was wholly irrelevant, being the declaration and acts of a third person, and was properly rejected.

The last point made necessarily involves the construction of the will of the testator, and upon that construction must depend the tenableness of the objections, that the verdict and recovery of the lessors of the plaintiff, is not justified by the evidence. It is admitted that the language of the will is by no means free from obscurity, owing to its peculiar phraseology, and the seeming incongruities of its several parts; still it is a settled judicial maxim, that when the court can fairly ascertain the real intention of the testator, and give effect to the several parts of the will, without rendering any component part inoperative, it is bound so to do. It is believed that in the present case, that maxim can be justly applied. If there should be an adherence to the literal interpretation of the first devise in the will, it is evident that the testator created an estate for life in both the quarter sections described, in favor of his wife, with a remainder over to her heirs; but after having done so, he then excepts section 14, being one of the two named, from the operation of this devise, and devises it to the lessors of the plaintiff, upon the condition, "*that they should continue to live with his wife, and be bound to her, and live with her until they are married.*" Now, this second devise of the same land evidently operated on and destroyed the first, as it relates to section 14, and it gave this section *in presenti* upon a condition which might, or might not, be performed. The performance would first depend on the consent of his wife, for unless she consented to the lessors' residing with her, and being bound to her, it is evident that they could not perform either part of the condition. Doubtless the testator was desirous that they, being then of tender age, should continue under the care and protection of his wife; and to effectuate that object more certainly, he designated the mode he supposed most likely to accomplish it; but it is seen that both the living and the indenturing of the lessors was prevented by the voluntary act of the wife, for whose benefit, it may be supposed, the condition was also in some measure originally created; and the more so, as when they became of more mature age, the testator must have supposed that they

Jones v. Bramblet.

Peck v. Boggess.

Curtis v. The People.

would be of great service to her. The accomplishment of this object is, however, eventually defeated by the death of Sarah Brown, the wife of the testator, and thereupon the condition annexed to the creation of the estate, in the lessors of the plaintiff, became an impossible condition to be performed, and consequently the lessors take the estate given, without the condition thus rendered nugatory. That estate, however, is but a life estate, to take effect on the death of testator's wife, there being no words of inheritance or perpetuity contained in the devise, and such words being indispensable to make a fee. The verdict then was neither against law nor evidence.

Judgment affirmed.

Robinson, for appellants.

Gatewood and *Eddy*, for appellees.



PECK v. BOGGESS.

1 Scam. R., 281.

Appeal from Jo Daviess.

1. Where the plaintiff demurs to a plea, and the demurrer is overruled, and thereupon the plaintiff replies; he waives his demurrer.

2. A party who does not except to an adverse instruction, cannot assign error thereon.

3. A *lumping* trade between partners upon their dissolution is a sufficient consideration for a promissory note given by one to the other, upon their final settlement, for a balance due the payee.

Judgment affirmed.

Cowles, for appellant.

Eddy and *Grant*, for appellee.



CURTIS v. THE PEOPLE.

1 Scam. R., 285.

Error to Madison.

An indictment for an assault with intent to kill, and murder, must show a felonious design, and the extent of the injury intended to be perpetrated.

THE indictment was in these words :

"State of Illinois, }
Madison County. } ss.

Of the October term of the Madison Circuit Court, in the year of

Curtis v. The People.

Swafford v. The People.

Israel v. Jacksonville.

our Lord one thousand eight hundred and thirty-three, the grand jurors, chosen, selected, and sworn, in and for the county of Madison, in the name and by the authority of the people of the State of Illinois, upon their oaths present, That William Curtis, on the thirty-first day of August, in the year of our Lord one thousand eight hundred and thirty-three, at the county of Madison aforesaid, with force and arms in and upon the body of one Jacob C. Bruner, then and there in the peace being, did make and assault, and him the said Jacob C. Bruner, with a certain stone and also a brickbat, which he, the said Curtis, then and there held in his right hand, did then and there beat and bruise, and otherwise ill treat, so that his life was then and there greatly despaired of, with an intent him the said Jacob C. Bruner, then and there, of his malice aforethought, to kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Illinois.

JAMES SEMPLE, Att'y Gen'l.

The defendant moved to quash the same, which motion was overruled. The defendant then pleaded not guilty, a trial was had—verdict guilty, and judgment thereon.

Conviction reversed.

J. B. Thomas and D. Prickett, for plaintiff.

N. W. Edwards, attorney-general for defendants.

SWAFFORD v. THE PEOPLE.

1 Scam. R., 289.

Error to Franklin.

AN appeal bond in a criminal case is not amendable.

Judgment affirmed.

Scates, for plaintiff.

N. W. Edwards, attorney-general, for defendants.

ISRAEL v. JACKSONVILLE.

1 Scam. R., 290.

Error to Morgan.

WHERE the charter of a town provides that *debt* shall lie for a breach of a town ordinance, a general summons, without specifying the form of the action, is illegal.

Judgment reversed.

Ransom v. Jones.

Stringer v. Smith.

Thornton v. Davenport.

RANSOM v. JONES.

1 Scam. R., 291.

Appeal from Schuyler.

1. THE possession of a note vests a right in the holder to sue in the name of the payee.

2. A note payable "in mason-work" is not assignable under the statute of Illinois.

3. The court will presume that an attorney appears by authority of his client.

*Judgment affirmed.**Hinman*, for appellant.*Minshall*, for appellee.

STRINGER v. SMITH.

1 Scam. R., 295.

Error to Sangamon.

A BILL of exceptions will not lie to the decision of the Circuit Court in a cause when the parties waive a jury and submit matters of law and fact to the judge for trial and judgment. (a)

*Judgment affirmed.**Walker*, for plaintiff.*Stuart* and *McConnel*, for defendants.

(a) S. P. Swafford v. Dovenor, 1 Scam. R., 165; White v. Wiseman, *ibid.*, 169; Gilmore v. Ballard, *ibid.*, 252. The law in this respect has been changed; the decision may be excepted to, and error assigned thereon. Cooke's Stat., 263, sec. 22.

THORNTON v. DAVENPORT.

1 Scam. R., 296.

Appeal from Morgan.

1. An absolute bill of sale of chattels, where the possession remains with the vendor, is fraudulent *per se* as to creditors.
2. But mortgages, marriage settlements, and limitations over of chattels, are valid without an accompanying possession, where the deed stipulates that the possession shall continue as before the execution of the instrument.
3. The fact that a mortgage was executed on the same day that a judgment was rendered against the mortgagor, is not *per se* evidence of fraud.

WILSON, C. J.—By agreement of the parties, this case was submitted to the court upon a statement of facts, accompanied by a deed of mortgage made by Wilhite to Thornton. By this deed, Wilhite conveys to Thornton a variety of personal property, for two hundred dollars, with a condition that if Wilhite will pay to Thornton, at

Thornton v. Davenport.

maturity, a note of two hundred dollars, with twelve per centum interest in one year, then the deed is to be void, otherwise absolute. It is also stipulated that Wilhite is to retain possession, and to have the use of the property until the day of payment. He is, also, at his own expense, to keep the property (part being live stock), and at the expiration of the year, if the debt be not paid, deliver it up to Thornton in good condition. The facts agreed upon, are, that Wilhite was indebted to Thornton in the sum of two hundred dollars, the amount for which he executed his note, and that the mortgage was made to secure this debt. Davenport and Henderson were also creditors of Wilhite, and on the same day that the mortgage was made, obtained a judgment against him, and soon after, but before the expiration of the year, levied their execution on the mortgaged property in the possession of Wilhite.

Upon this statement of the case, the court below decided the deed from Wilhite to Thornton to be void as to the creditors of Wilhite, and consequently subject to the execution of Davenport and Henderson. To support this position, it must be shown that the transaction between Wilhite and Thornton was fraudulent in fact, or that the conveyance is of such a character that the law will imply fraud; and that countervailing testimony of fair intention will not redeem it from this inference. That the sale from Wilhite to Thornton is not fraudulent in fact, is apparent from a consideration of all the circumstances attending the transaction, as admitted by the parties. The sufficiency of the consideration upon which the mortgage was made, is not questioned. It is admitted that Wilhite was indebted to Thornton in the sum of two hundred dollars, and that the property mentioned in the deed was mortgaged to secure this debt. The only circumstance of a questionable character is, the execution of the mortgage on the same day of the rendition of the judgment against him, in favor of Davenport and Henderson. But this fact, unaccompanied by any other circumstance calculated to cast suspicion upon the transaction, is not of itself sufficient to attach to it the imputation of fraud, and thereby taint and render void the whole transaction. The transfer to Thornton, in its most unfavorable aspect, only amounts to a preference of one creditor to another; a privilege to which the debtor is always entitled. Even an insolvent debtor may prefer one creditor to another, and his motives for so doing, provided the preferred creditor has done nothing improper, cannot be inquired into; nor is the time when this preference is indicated material, provided it is anterior to the lien set up to avoid it.

There being no circumstances, then, attending the conveyance of the

property from Wilhite to Thornton, from which fraud in fact can be inferred, it becomes necessary to inquire whether it is alike free from the inference of fraud in law. In the argument of the case, the statute of frauds and perjuries was adverted to; but as the deed under review was made upon valuable consideration, it does not come within the provisions of that statute. The case, therefore, depends entirely upon the principles of the common law; and it is to be regretted that the judicial determinations relative to the rules governing the transfer of personal property, which are of so much importance, and such general application, have not been more stable and definite. But while the decisions of the courts of several of the States have been vacillating and discordant, those of England, as well as those of a large majority of the States, have been uniform and consistent; and the principle well established by those decisions, is, that all conveyances of goods and chattels, where the possession is permitted to remain with the alienor or vendor, is fraudulent *per se*, and void as to creditors and purchasers, *unless the retaining of possession be consistent with the deed*, as in case of an absolute unconditional sale, where the possession does not "accompany and follow the deed." Here the vendor's possession is not merely evidence of fraud, but, by legal inference, is a fraud *per se*, and cannot be rebutted by testimony of fair intention; because the possession not remaining with the person shown by the deed to be entitled to it, works deception and injury. But where, from the nature and provisions of the conveyance, the possession is to remain with the vendor, and the transaction is *bonâ fide*, its so remaining is consistent with the deed, and does not avoid it.

The application of these principles to the present case will clearly establish the validity of Thornton's title to the property in controversy. The conveyance from Wilhite was a mortgage, the legitimate object of which was to secure to a creditor a just debt; and it was expressly stipulated in the deed that Wilhite should retain possession of the mortgaged property, until the debt became due. Had not the deed contained this authority for his possession, there is no doubt but his retaining it would have constituted a legal fraud. Such too would have been the effect of his remaining in possession, if the deed to Thornton had been an absolute, in place of a conditional one, though authorized by its terms. In the first case his possession would not be authorized by the deed; and in the other, it would be inconsistent with its character, and therefore void. Neither of these objections, however, apply in this case. Wilhite's possession of the property is consistent with the object and intent of the deed, and is warranted as well by its stipulations as by its usual and legal operations; for it is

Thornton v. Davenport.

of the nature of a security that the debtor should retain possession until the day of payment be past.

Among the numerous authorities from which these principles are deduced, there are several cases directly analogous to the present, such as the case of *Cadogan v. Kennet*, where, by settlement before marriage, the husband conveyed all his household goods to trustees, to the use of himself for life, with remainder over, and with a proviso that he should retain possession and enjoy the property; his doing so, the court said, being consistent with the object, intent, and provisions of the deed, did not render it void. Such too was the decision in the case of *Claybourn's Executors v. Hill*, which was the case of a mortgage of personal property, with an express stipulation that the debtor should retain possession. The only deduction from these and numerous similar cases, is, that mortgages, marriage settlements, and limitations over of chattels, are valid against all persons, without delivery of possession; provided the transfer be *bonâ fide*, and the possession remain with the person shown by the stipulations of the deed to be entitled to it. Were a different rule to prevail, one which would not under any circumstances sanction the separation of the title to personal property, from the possession, it would, in many cases, render the transfer of personal property to suit the convenience of parties extremely inconvenient, and, in some cases, impossible; as where from the situation of the property at the time, it was incapable of delivery; as in the case of a sale of a ship at sea, or the limitation over of chattels, after the use of them for life or for years, to another. I admit that there are some authorities which seem to militate against, and others that are less equivocally opposed to, the rule here laid down, which permits the possession of personal property, in cases like the present, to be separated from the title. But I think the principle so well established by an overwhelming current of authorities, that no arguments drawn from policy, will justify the court in departing from it.

Dissent of Lockwood, J.—I cannot concur in the opinion of the court, because I believe that where the motive for the sale or mortgage is security of the vendee or mortgagee, and the vendor or mortgagor is permitted to retain the possession and visible ownership for the convenience of the parties, it is a fraud, though the arrangement be inserted in the deed or mortgage. The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner. The law will not stay to inquire whether

Thornton v. Davenport.

Kitchell v. Bratton.

there was actual fraud or not; it will infer it at all events; for it is against sound policy to suffer the vendor or mortgagor to remain in possession, whether an agreement to that effect be or be not expressed in the deed. It necessarily creates a secret incumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is thereby enabled to practise deceit upon mankind. If the possession be withheld pursuant to the terms of the agreement, some good reason for it, beyond the convenience of the parties, must appear; and the parties must leave nothing unperformed within their power to secure third persons from the consequences of the apparent ownership of the vendor or mortgagor. In support of my views on this subject, I have used the language of Chancellor Kent, commenting on the case of *Clow v. Woods*. In that case the Supreme Court of Pennsylvania decided, that the delivery of the goods is held to be as requisite in the case of a mortgage of goods, as in the case of an absolute sale under the statute 13 and 27 Elizabeth, and that merely stating on the face of the deed, that possession was to be retained, is not sufficient to take the case out of the statute, even in the case of a mortgage of goods.

*Judgment reversed.**Breese and W. Thomas, for appellant.**Lamborn, for appellees.*

KITCHELL v. BRATTON.

1 Scam. R., 300.

Appeal from Crawford.

1. A mortgage of personal property from a debtor to his creditor, which stipulates for possession in the mortgagee, is not fraudulent, nor need it be recorded under the statute of frauds as in cases founded upon a good as contradistinguished from a valuable consideration.
2. If, notwithstanding the stipulation, the possession remains with the mortgagor, this is a fraud *per se* as to creditors of the latter.
3. The plaintiff in error cannot attack an instruction which was favorable to his rights in the court below.
4. Where an instruction is erroneous, and the bill fails to show wherein it was an abstract proposition, the Supreme Court will indulge in no intendments in support of the judgment below, but will remand the cause for a new trial.

WILSON, C. J.—In this case the question in the court below was relative to the ownership of certain articles of personal property which were levied on as the property of J. and P. Higgins, but which were claimed by J. Kitchell, who produced and gave in evidence a deed of mortgage from the Higgins to himself, of the property levied on. The consideration of the deed, as appears from its face, was a debt due

from the Higgins to Kitchell. By the stipulations of the deed, Kitchell was to have immediate possession of the property, but he was bound to relinquish all title thereto upon the payment of his debt. Upon the trial in the Circuit Court, the counsel for the appellant, Kitchell, moved the court to instruct the jury that if they believed the mortgage was made upon consideration deemed valuable in law, that then it was not necessary to record it. This instruction the court refused to give; but instructed the jury that unless they were satisfied from the evidence, that the appellant had had, and *bonâ fide* remained in, possession of the property, that then the mortgage was void, unless recorded within eight months.

To these instructions, the appellant, Kitchell, by his counsel, excepted, and assigns for error, 1st, the refusal of the court to give the instructions asked for; and 2d, the giving the instructions which the court gave. From the instructions asked for and refused, as well as those given, it would seem that the court considered the conveyance as coming within the provisions of that branch of the statute of frauds and perjuries which renders void, as to creditors, all deeds made upon consideration *not* deemed valuable in law, unless possession shall remain with the donee, or unless recorded. This view of the case is clearly erroneous. The deed to Kitchell is upon consideration deemed valuable in law, and therefore excluded from the operation of that branch of the statute which authorizes recording. The statute applies to deeds for personal property, made upon *good* consideration only, as distinguished from *valuable*, and with respect to them, substitutes possession for recording. In the instructions given by the court, there was no error, except in that branch of it which recognized the alternative of recording as equivalent to possession in the mortgage, for the purpose of giving validity to the deed. This is not the law; but inasmuch as it was an error favorable to the appellant, by making valid his mortgage by either possession or recording, he has no ground of complaint. The refusal, however, of the court to give the instructions asked for, was clearly erroneous. But what would have been the effect of those instructions, and whether, if given, a different result would have been produced, depends upon a fact which is not disclosed by any part of the record; that is, whether the possession of the property remained with the mortgagors, or, whether it passed, according to the terms of the deed, to the mortgagee, and was by him retained. If the fact was that the mortgagee took and retained possession of the property, then the instructions asked for, had they been given, would have entitled him to a verdict, and were therefore material. But if the possession did not continue with him, the deed was by legal infer-

Kitchell v. Bratton.

Baldwin v. The People.

Prevo v. Lathrop.

ence fraudulent and void, and the instructions could not have availed him. The rule governing conveyances of personal property, as laid down in the case of Thornton v. Davenport and Henderson, decided at this term of the court, is that "Unless possession shall accompany and follow the deed," it is by legal inference fraudulent and void as to creditors. If, then, from the evidence in this case, it appeared that possession was taken and retained by Kitchell, and the transaction was otherwise fair, his title to the property was valid. But if, on the other hand, the property remained in the possession of the Higgins, its so remaining rendered the conveyance fraudulent *per se*, because inconsistent with the stipulations of the deed which gave the possession to Kitchell, until the debt was paid.

The bill of exceptions should have stated the proof upon this point ; but as it has not done so, the case is too imperfectly presented to enable this court to say what should have been the decision below, or give such judgment here, as that court ought to have given. The decision of the Circuit Court is therefore reversed, the cause remanded, and a new trial awarded, conformably to this opinion. The costs of this court to be paid by the appellee.

Judgment reversed and remanded.

Janney, for appellant.

Scates and Field, for appellee.

BALDWIN v. THE PEOPLE.

1 Scam. R., 304.

Error to Cook.

1. INDICTMENT for stealing a *horse* ; evidence that the animal taken was a *mare* constitutes no variance.

2. Indictment for feloniously "stealing, taking and *carrying away*" a horse, etc., is supported by proof that the defendant *led, drove* or rode away the animal.

Judgment affirmed.

Caton, for plaintiff.

Grant, State attorney, for defendants.

PREVO v. LATHROP.

1 Scam. R., 305.

Appeal from Clark.

1. A BY *parol*, bargained and sold a parcel of land to B, for \$400 on a credit of 1, 2, 3 and 4 years, payable in equal installments

Prevo v. Lathrop.

Vickers v. Hill.

Buckmaster v. Grundy.

"with interest"—six years thereafter B gave his note to A for the purchase money, but the parties disputed about the rate of interest, and left that an open question for future adjustment—the note was paid, and suit brought for the interest. *Held*, that the agreement to pay interest was not void under the statute of frauds.

2. Where the promise to pay the interest was made Aug. 26, 1832, and the suit to recover it was instituted May 21, 1835. *Held*, that the statute of limitations constituted no bar to the action.

3. Where there is no special agreement established as to the rate, "interest" will be considered as payable at and after the per centum fixed by law.

Judgment affirmed.

Eddy and *D. J. Baker*, for appellant.

Pearson, for appellee.



VICKERS v. HILL.

1 Scam. R., 307.

Error to Marion.

1. The overruling of a motion for a continuance cannot be assigned for error.

2. Where an affidavit for a continuance sets forth material facts which exist, and which the affiant affirms he can prove by absent witnesses—the adverse party may, by admitting the facts, demand an instant trial.

3. *Quære?* On a motion for a continuance on account of the absence of a witness, who resides in a foreign country, the question of diligence to compel his attendance, will depend upon the fact, whether a tender of legal fees was made to the absent witness.

Judgment affirmed.

Scates, for plaintiff.

Eddy, for defendant.



BUCKMASTER v. GRUNDY.

1 Scam. R., 310.

Error to Johnson.

1. A plea is a waiver of a demurrer to the declaration.
2. But if the Circuit Court sustain a demurrer to the defendant's pleading, on error, he may carry the demurrer back to the declaration.
3. Where a vendor covenants to execute and deliver a deed to his vendee, the latter is not bound to prepare and tender the deed to the vendor for execution and delivery.

Buckmaster v. Grundy.

4. A sealed instrument imports a consideration, and in an action upon a covenant to convey land, vendee the is not bound to aver any other consideration in declaring upon the contract.
5. *Quære?* Can a plea of no consideration be sustained to a declaration upon a covenant to convey land.
6. A want of consideration must be pleaded.
7. In covenant upon a bond conditioned to convey land, where a breach is averred and proved, the measure of damages is the value of the land at the time the breach occurred, and not the consideration money and interest thereon.
8. In cases where the covenant of the defendant is independent in its character, a simple breach constitutes a ground of action, and the plaintiff need not aver any act or offer on his part.
9. In such a case a plea merely alleging a readiness to perform, is bad on demurrer. The defendant should show an offer or some excuse for his omission.

COVENANT upon a *penal bond*, made by Buckmaster to Grundy, in the usual form, with this *condition*, "that if the above bound Nathaniel Buckmaster shall make a general warranty deed in fee simple, to one undivided third part of two hundred and sixty-seven acres and ninety-seven hundredths of an acre, with the ferry thereunto belonging, lying on the east bank of the Mississippi, opposite the mouth of the Missouri, or just above it, being the tract or parcel of land the said Buckmaster purchased of Thomas Carlin, to William Grundy, by the first day of September next, then the above obligation to be void; otherwise to remain in full force and virtue in law, as witness my hand and seal this ninth day of January, 1819."

The defendant demurred to the declaration, which was overruled, and the defendant then pleaded, 1. Performance. 2. A *readiness* to perform, without averring an offer to do so, and stating the time, place, and circumstances in his plea. To the second plea the plaintiff demurred, and the court below sustained the demurrer. A trial was then had upon the declaration, and plea, No. 1, which resulted in a verdict and judgment for the plaintiff of \$3,562. The errors assigned were, 1, Overruling the demurrer to the declaration; 2, Sustaining the demurrer to plea No. 2; and 3, The rendition of the judgment.

WILSON, C. J.—Owing to the earnest and somewhat confident manner with which the counsel urged the sufficiency of the errors assigned, more care has been taken in their investigation, than from the familiarity and frequent application of the principles upon which they depend, they would otherwise have been entitled to. The first and second assignment of errors may be considered together; for the defendant may be regarded as having abandoned his demurrer to the plaintiff's declaration, by pleading over, after the declaration had been sustained by the court; yet as the plaintiff's demurrer to the defendant's second plea extends to the declaration, and brings that as well as the plea under review—and as a defect in the declaration will entitle the defendant to judgment, it will be proper to notice that first.

Buckmaster v. Grundy.

One of the objections to the sufficiency of the declaration is, that it does not aver that the plaintiff tendered a deed to be executed. The next is, that it contains no averment that the plaintiff had paid any consideration for the land, and consequently he was entitled to no damages for a failure to convey. Neither of these objections are well taken. The declaration is in the usual form in an action of covenant, and by setting out the bond upon which suit is brought, sufficient is shown to entitle the plaintiff to his action. No statement of consideration is necessary, as the seal itself imports a consideration. Under the statute it is true that the want of consideration may be put in issue by a plea to that effect; but this method of denial of the consideration upon which the contract in this case was entered into, has not been adopted by the defendant, and no other mode will avail him. It is also argued that the exact sum actually paid, must not only be averred, but proved; and that the sum so paid, and interest, constitute the measure of damages to be assessed by the jury. Though this may be the rule in an action upon a warranty to recover back the consideration in case of eviction, it is not the rule in an action of covenant for a breach in failing to convey according to the terms of the contract. In such case the value of the land at the time it is to be conveyed (as established by evidence), is the true measure of damages. As no exception was taken to the verdict in the court below, we must presume that the damages given were warranted by the evidence.

The next objection to the declaration is, that it does not aver that the plaintiff prepared and tendered to the defendant a deed for him to execute.

The nature of the averments in a declaration depend upon the character of the covenants contained in the deed upon which suit is brought. Where they are dependent, it is essential that the plaintiff should aver performance, or an offer to perform the agreement on his part; but where they are independent, performance on the part of the plaintiff need not be averred. In this case the covenant of the defendant is necessarily independent, as the deed contains but one, and that is, that the defendant, Buckmaster, will make a general warranty deed to the plaintiff by a day named. No act is to be performed by the plaintiff; the undertaking of the defendant is absolute and unconditional, and expressed in language so clear and unambiguous, as to admit of but one inference as to what was the intention of the parties. To require one party to do that which he has not engaged to do, but which the other has, would be confounding all notions of justice and legal obligation. It was, therefore, unnecessary for the plaintiff to aver a tender of a deed. For the same reason that the declaration is considered

Buckmaster v. Grundy.

Davenport v. Farrar.

good, the defendant's second plea must be adjudged bad. His covenant is unconditional and affirmative, that he will, by a day specified, make to the plaintiff a deed, etc. A plea, then, merely alleging a readiness to perform, furnishes no excuse for a non-performance, when unconnected with any apology for the omission. If by a subsequent agreement between the parties, the time of performance had been extended, or if by the act of the plaintiff himself, he had put it out of the power of the defendant to perform his covenant, as if he had remained beyond the limits of the State until the expiration of the time fixed for the performance of the contract; either of these facts, properly pleaded, would have afforded an excuse to the defendant. But as no such excuse is contained in the plea, the court very properly adjudged it bad.

With regard to the obligation of the vendee to prepare the deed according to the English authorities referred to, it is to be observed that those decisions were made with reference to the parties under a system of conveyancing which has grown up there, and is well understood; but no such system exists here, and parties to a contract for the conveyance of land cannot therefore be supposed to have reference to it, as regulating the duty of each, with respect to the preparation of the title papers. Whatever, then, may be the practice in England, the purchaser here is not bound to prepare and tender a deed to the vendor, unless such obligation can be fairly inferred from the terms of the contract.

Judgment affirmed.

Semple and Prickett, for plaintiff.

Eddy, for defendant.



DAVENPORT v. FARRAR.

1 Scam. R., 314.

Appeal from Jo Daviess.

1. A widow is only endowable of estates of *inheritance*, either legal or equitable.
2. A widow is not entitled to dower in a preëmption right of her deceased husband attached to land belonging to the U. S.
3. A petition for the assignment of dower should aver all the facts which are requisite to establish the widow's right. In other words she must aver—1, the seisin of her husband at law, or in equity in the particular parcel of land; 2, her marriage; and 3, his death.
4. The words "*owner and proprietor*" do not, in a petition for dower, import an estate of inheritance.
5. Under our statute a widow is dowerable of *equitable* estates of inheritance.

LOCKWOOD, J.—This was a *petition* filed by Sophia Farrar in the Circuit Court of Jo Daviess county, to have her dower assigned to her under the act entitled "*An act for the speedy assignment of*

Dower and Partition of Real Estate," approved 6th February, 1827. The petition states that Sophia Farrar is widow of Amos Farrar, deceased, and that her husband, in his lifetime, was a joint owner and proprietor with George Davenport and Russell Farnham, now deceased, of the following described real estate, situate in the county of Jo Daviess, namely, a tract of land situate at a place called the "Portage," between the Mississippi and Fever Rivers, about four miles below Galena, together with a farm and several buildings and other improvements thereon erected, formerly occupied as a trading establishment with Indians, by Davenport, Farrar, and Farnham. Also three lots of ground in the town of Galena, which are particularly described. The petition further states that Amos Farrar, her said husband, continued to hold the above described premises jointly with the said Davenport and Farnham, to the time of his death; that he left one child, an infant; and that her dower in said premises has not yet been assigned and set over to her, according to the intendment of law.

A variety of proceedings was had in the court below, which it is unnecessary to recite, and which resulted in a decree that Sophia Farrar was entitled to dower in the tract of land and town lots mentioned and described in her petition. Numerous errors have been assigned; it will, however, be unnecessary to notice any but the following one, to wit, "That by the record it appears that the husband of the appellee had no such estate in the premises, during coverture, and at the time of his death, of which, by the law of the land, dower could be assigned." By the second section of the act above recited, it is declared, that "Every widow claiming dower, may file her petition in the Circuit Court of the county, against the parties mentioned in the first section of the act, stating their names, if known, setting forth the nature of her claim, and particularly specifying the lands, tenements, and hereditaments, in which she claims dower, and praying that the same may be allowed to her," etc. Does this petition, with sufficient clearness and certainty, set forth the nature of the claim to dower? To answer this question, it is necessary to ascertain what estate a husband must have in land, to entitle his wife to dower therein. At common law, a woman is entitled to be endowed of all the lands and tenements of which her husband was seized in fee simple or fee tail general, at any time during coverture; and of which any issue which she might have had, might by possibility have been heir. In addition to this provision of the common law, the 49th section of the statute relative to wills and testaments, executors and administrators, and the settlement of estates, provides, "That equitable estates shall be sub-

ject to the widow's dower, and all real estate of every description contracted for by the husband in his lifetime, the title to which may be completed after his decease." By the phrase "equitable estates," in this statute, we understand equitable estates of inheritance. The legislature, in making this alteration of the common law, could not have intended to embrace any estate less than an estate of inheritance; because estates for years are subject to the payment of debts, and on distribution of the surplus of the personal estate, the widow comes in for her third of that surplus, including estates for years. Does, then, this petition show that the husband of the petitioner was seized of the lands and lots mentioned thereing in fee simple, or fee tail general? The only words in the petition, explanatory of the nature of the estate of the husband, are, that he was joint *owner* and *proprietor*, with others, of the land and lots. These words do not technically, nor by common usage, describe an estate in fee simple or fee tail, but are general words applicable to the possessors of all estates, and may mean estates for years, or for life, as well as estates of inheritance. When a party comes into a court of justice, it is incumbent upon him to exhibit a right to recover, in clear and legal language, otherwise the court cannot grant the relief sought. There should be nothing ambiguous or doubtful in the nature of the right claimed. When certain words obtain in law a particular signification, and are always used to express a given idea, they become technical; and a willful or unnecessary departure from them ought not to be tolerated by courts of justice, unless the substituted words express the same idea, and are equally limited in their signification. The petitioner, then, not having set forth by words known to the law, that her husband was seized of such an estate of inheritance as was necessary in order to entitle her to dower in the premises, but having used words that are of such general signification as to include other estates than those of inheritance, has failed to bring such a case before the court as to entitle her to recover. If the petition relied upon the equitable estates mentioned in the statute, it still would have been necessary to state such facts as would show that her husband had such an equity as is contemplated by the statute. The court being of opinion that the petition is insufficient to justify a claim for dower, might refrain from expressing an opinion upon other questions that were argued in this cause; but as it is probable that new proceedings may be instituted, if no opinion is given upon what are probably the merits this cause, they deem it advisable to state their views, as to the question whether a right of preëmption under the laws of Congress, is such an estate in the husband, that a widow can be endowed of it. A preëmption interest in land, is unknown

Davenport v. Farrar.

Choisser v. Hargrave.

to the common law. Does then a preëmptioner under the acts of Congress, possess, in law or equity, an estate of inheritance? It would seem to be sufficient merely to state the question, to answer it in the negative. What is his right? It is a right to purchase at a fixed price, within a limited time, in preference to others. If he is either unable or unwilling to purchase at the price, or by the time mentioned in the law, the land can be sold to others, and the preëmptioner turned out of possession as an intruder. These conditions annexed to his possession, clearly show that his interest is only temporary, and may never ripen into an estate of inheritance. While, therefore, the preëmptioner remains in possession, his estate cannot be considered of a higher nature than an estate for years, and consequently the widow cannot be endowed of it.

Judgment reversed.

Cowles and T. Drummond, for appellants.

Pearson, for appellee.

CHOISSER v. HARGRAVE.

1 Scam. R., 317.

Error to Gallatin.

1. The act of Sept. 17, 1807, enacted by the Territorial Legislature of Indiana relative to the indenturing and registering of negroes and mulattoes, was repugnant to the ordinance of Congress for the government of the Northwestern Territory, ordained July 13, 1787, and therefore void.
2. But the constitution of Illinois, of August 26, 1818, confirmed such indentures as were entered into between the master and slave, if they were entered into in conformity with the provisions of the act of 1807.
3. The act of 1807 required that the indenture should be entered into within thirty days from the time the negro or mulatto was brought into the territory.
4. Where a negro came into Illinois in 1816, and did not enter into indentures with his master until Aug. 15, 1818, a few days before the adoption of the Illinois constitution, such indentures are void, and the negro free.
5. No presumptions arising out of lapse of time will destroy the presumption of freedom, when a person of color asserts his right as a free man.
6. The right of a negro to freedom may be tried in an action of trespass for assault and battery and false imprisonment, against his pretended master.

WILSON, C. J.—This action, for an *assault and false imprisonment*, was brought by the defendant in error, Barney Hargrave, a colored man, against John Choisser (who claimed the defendant in error as an indentured servant), to try his right to freedom. Upon the trial in the Circuit Court, judgment was rendered in favor of Barney Hargrave, from which judgment Choisser has appealed. The facts in the case, as admitted by the parties, are, that Barney “was brought into the Territory of Illinois at or before 1816, but that he was not indentured or registered until the 15th day of August, 1818,” when he was indentured to Willis Hargrave, who transferred him to A. G. S.

Wight, and he to Choisser. The indentures and subsequent transfers are all in point of form according to the statute of the territory. The only question is, whether a compliance with the forms prescribed by the statute, does, under the circumstances of this case, give to Choisser a valid title to the services of Barney, according to the tenure of the indentures. By the Ordinance of Congress for the government of the territory northwest of the Ohio, passed in 1787, it is declared, "There shall be neither slavery nor involuntary servitude in said territory, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted." Notwithstanding the prohibition of this ordinance, an act of the territory of Indiana, passed in 1807, and which was continued in force here, provides "That it shall and may be lawful for any person being the owner or possessor of any negroes or mulattoes, of and above the age of fifteen years, and owing service or labor as slaves in any of the States or territories of the United States, or for any citizens of the said States or territories purchasing the same, to bring the said negroes or mulattoes into this territory," and "The owners or possessors of any negroes or mulattoes, as aforesaid, and bringing the same into this territory, shall, within thirty days after such removal, go with the same before the clerk of the Court of Common Pleas of the proper county, and in presence of said clerk, etc." The owner and the slave shall agree upon the time the slave shall serve his master, and the clerk shall record such agreement. But if the negro shall refuse to enter into this agreement, then the master is authorized within sixty days to remove him from the territory. This act of the territorial legislature is clearly a violation of the ordinance of Congress of 1787, and consequently void. But by the 3d section of the 6th Article of the Constitution, it is declared, that "Each and every person who has been bound to service by contract or indenture heretofore existing and in conformity with the provisions of the same, without fraud or collusion, shall be held to a specific performance of their contracts or indentures, and such negroes or mulattoes as have been registered in conformity with the aforesaid laws, shall serve out the time appointed by said laws."

By this provision of the Constitution, it is contended that Choisser's title to Barney, as an indentured servant, is recognized and confirmed. But to sustain this position, it must appear that the territorial statute has been complied with. The Constitution confirms only those indentures that were made in conformity to the act of 1807, and one of the essential requisites to the validity of an indenture under that act, was, that it be made and entered into within thirty days from the time the

Choisser v. Hargrave.

McKinstry v. Pennoyer.

negro or mulatto was brought into the territory. This requirement has not in the present case been complied with. It appears both from the depositions and the admissions of the parties, that Barney was brought into the territory "at or about the year 1816, but that he was not indentured or registered until the 15th of August, 1818," thus leaving an interval of at least eighteen and a half months between the time when he was brought into the territory, and the time when he was indentured. This circumstance is conclusive against the claim of Choisser, and no inference in favor of the regularity of the indentures can be drawn from the lapse of time, in contradiction to the admitted facts.

Judgment affirmed.

Gatewood, for plaintiff.

Eddy and Robinson, for defendant.



McKINSTRY v. PENNOYER.

1 SCAM. R., 319.

Appeal from Cook.

1. Plea in abatement alleging a misnomer of the defendant—demurrer thereto—demurrer overruled—leave to reply—replication filed—issue thereon—verdict and judgment for plaintiff—judgment reversed.
2. The judgment upon overruling a demurrer to a plea in abatement must be peremptorily for the defendant. If the demurrer is sustained, *respondeat ouster* is the proper judgment to award.
3. It is error in the Circuit Court to permit a plaintiff to reply to a plea in abatement after overruling his demurrer thereto.
4. The Supreme Court will not sanction an arbitrary and illegal exercise of discretionary power by an inferior court, nor will it carry the doctrine of discretion further than prior cases have established it.
5. No costs allowed upon an issue of law.

LOCKWOOD, J.—This was an action of *trespass on the case*, brought by Pennoyer and others against McKinstry. The defendant below in proper person pleaded in abatement, a misnomer of his name, and prayed judgment of the writ that it be quashed. To this plea the plaintiffs below demurred, and defendant joined in demurrer. After argument in the Circuit Court, the demurrer was overruled, whereupon the plaintiffs moved the court for leave to answer over to the defendant's plea, which was granted; the granting of which motion was excepted to by the defendant's counsel, who moved for final judgment on the demurrer. Granting leave to the plaintiffs below, to reply, and the refusal to give final judgment on the demurrer, are among the causes assigned for error.

The question arising from this assignment of error is, whether the decision of the Circuit Court on the demurrer was final, or had the court a discretionary power to grant the plaintiffs leave to answer

McKinstry v. Pennoyer.

Crain v. Bailey.

over. The rule laid down in the books of practice and pleading is, that when a plea in abatement is regularly put in, the plaintiff must reply to it, or demur. If he reply, and an issue in fact be thereupon joined, and found for him, the judgment is peremptory, *quod recuperet*; but if there be judgment for the plaintiff on demurrer to a plea in abatement, or replication to such plea, the judgment is only interlocutory, *quod respondeat ouster*. The judgment for the defendant on a plea in abatement, whether it be an issue in fact or in law, is that the writ or bill be quashed; or if a temporary disability or privilege be pleaded, that the plaint remain without day until, etc. On an issue in fact the defendant is entitled to costs, but not on an issue in law.

According to the principles above laid down, the Circuit Court, upon overruling the plaintiffs' demurrer to the defendant's plea in abatement, should have given judgment that the writ be quashed. This is conceded to be the law in the written arguments presented to this court by the defendants in error; but they contend that the Circuit Court might in its discretion permit the plaintiffs below to amend by taking issue on the plea in abatement. This doctrine of discretion ought not to be carried too far. It tends to produce contradictory decisions in the Circuit Courts, without power in the appellate tribunal to correct error, and thus produce uniformity. This court, therefore, cannot extend the doctrine of discretion further than previous decisions have done, unless it be where, from the nature of the case, the court must necessarily have a discretionary power. As neither the books of practice or adjudged cases, as far as they have come to our knowledge, recognize any such discretion in the court, as is claimed in this case, the judgment below must be reversed, with costs of reversal, and a judgment entered in this court, that the suit be quashed. As this was a decision on an issue in law in the Circuit Court, no costs of defence in that court are given.

Judgment reversed.

Grant and Scates, for appellant.

Spring, for appellees.



CRAIN v. BAILEY.

1 Scam. R., 321.

Error to Tazewell.

1. ON appeals from the Probate to the Circuit Court, the bond must be payable to the people, etc., a bond to the appellee is void, and the appeal may be dismissed.

Crain v. Bailey.

Smith v. Hileman.

2. *Quære?* It is discretionary with the Circuit Court to permit the appeal to be perfected by the filing of a new appeal bond.

3. Discretionary power will not be reviewed in the Supreme Court.

Judgment affirmed.

Stone and Walker, for plaintiff.

Browning and Stuart, for defendants.

SMITH v. HILEMAN.

1 SCAM. R., 323.

Error to Union.

1. The statute of 1827 in reference to the sale of lands to pay intestate debts, was silent as to the county in which the administrator should file his petition. Therefore under this act the Circuit Court of the county in which the land is situate has jurisdiction. Under the act of 1829, the application must be made to the court of the county in which letters of administration were granted.
2. The statute requires an administrator's deed to "set forth the order of sale *at large*," an omission to do so renders the deed void.
3. A recital of the substance of the order is insufficient, a literal compliance with the requirements of the statute is essential to the validity of the deed.
4. If the administrator's deed is void upon its face, it may be attacked collaterally in an action of ejectment.
5. The court in granting an order to sell land to pay intestate debts, cannot authorize payment in any other than gold and silver coin or other legal currency; an order substituting any other medium of payment is voidable by appeal or writ of error, or by bill of review, but cannot for this reason be impeached collaterally.
6. Special statutory powers affecting real estate, must be strictly pursued and so appear upon the face of the proceedings, or the power is not well executed.

SMITH, J.—This was an action of *ejectment* brought by the heirs of J. Weaver, deceased, for the recovery of the possession of a quarter section of land in Union county, sold by the administrators of Weaver, and purchased by the father of the defendant, Hileman, and devised to the defendant. There were separate demises laid from each heir, and a plea of not guilty; a verdict and judgment for defendant. The cause is brought to this court on a writ of error. During the progress of the trial, a bill of exceptions was taken to the opinion of the Circuit Court in admitting the petition, proceedings, and judgment of the Circuit Court of Union county some years previous, under the laws relative to the sale of the real estate of intestates, whose personal estates were insufficient to pay the debts of such intestates, and the evidence of such sale, and the deed made to Jacob Hileman, the purchaser, at such administrators' sale. Under the exceptions taken, the counsel for the plaintiffs in error, now make the following points for the consideration of this court, and assign the same for error:

1st. The Circuit Court erred in permitting said defendant to read to the jury the order of said Circuit Court, directing the sale of the land in question.

2. The Circuit Court erred in permitting the said defendant to read

in evidence to the jury, the paper purporting to be a deed from the administrators of Weaver, deceased, to Jacob Hileman, deceased.

3d. The deed is defective and void, because it does not set forth the order of sale at large.

4th. It does not show a sale made according to the order of the court.

5th. The order of sale authorizing the notes of the State Bank of Illinois to be received in payment, was unauthorized, and the court had no legal power to make such order.

6th and 7th. The application for the order of sale was not made in the county in which letters of administration were granted.

The preceding objections seem to resolve themselves, except that made under the fifth head, into two, and are embraced in them.

1st. That the application for the order to sell the lands was addressed to a tribunal having no legal cognizance of the subject.

2d. That the deed does not conform to the prerequisites of the law giving the form and mode of conveyance.

The first objection is not tenable. The act of 1827, under which the proceedings were had, does not, like the act of 1829, require that the application should be made to the Circuit Court of the county "in which administration shall have been granted." The application is not restricted, and as it was made to the Circuit Court of the county where the lands lie, we perceive no objection to the power of the court to direct the sale on the score of jurisdiction. On the second point it seems very clear that the deed is not conformable to the statute. The words are imperative. The 6th section of the act of 1827, declares that "the conveyance for the same shall set forth such order at large." The reason of this precision we are not at liberty to inquire into, nor what the supposed necessity may have been in the opinion of the legislature for its adoption. It is sufficient to perceive that a recital of the substance of the order, is not a compliance with, or an observance of the act. A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued, and should appear to be so on the face of the proceedings.

In the present case, the contents of the order are not set forth in the deed; there is a mere recital that the sale had been made in pursuance of the order of the court, but what the terms of that order were, is nowhere declared in the deed. It cannot, then, be doubted that the omission to set out the order is fatal.

The order as to the description of funds to be received under the sale, was irregular. The court could only direct a sale to be made for the

Smith v. Hileman.

Kinman v. Bennett.

Aiken v. Deal.

legal currency of the State. None other could be recognized; and the direction to take payment in notes of the State Bank of Illinois was not warranted by law.

The proceedings of the Circuit Court of Union county, in relation to this order, were not, however, absolutely void for that cause, but voidable only. The defendants might reverse the proceedings for the error, but still the record of them for that cause was not inadmissible as evidence.

But the deed ought not to have been admitted as evidence, and the decision of the Circuit Court by which it was admitted, was clearly erroneous.

Judgment reversed.

D. J. Baker and Eddy, for plaintiff.

Dougherty, Gatewood and Scates, for defendant.



KINMAN v. BENNETT.

1 Scam. R., 326.

Appeal from Pike.

1. WHERE the Circuit Court dismisses an appeal from a justice, for want of jurisdiction, the order for costs should be against the appellant.

2. Where the appeal is dismissed on the motion of the appellant, the judgment should be against him for the costs.

3. Where the record of the Circuit Court fails to show the reason why an appeal was dismissed, if the judgment is against the appellee for costs, the Supreme Court will reverse the judgment.

Judgment reversed.

Wheeler, for appellant.

Whitney, for appellee.



AIKEN v. DEAL.

1 Scam. R., 327.

Motion to set aside a default rendered by the Circuit Court of Peoria.

1. THE Supreme Court will not entertain a cause unless it comes before it in the mode provided by law.

2. The Supreme Court has no original jurisdiction to set aside a default rendered by an inferior court.

Motion denied.

Southwick, for plaintiff.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS.

IN JUNE TERM, 1837, AT VANDALIA.

HURLEY v. MARSH.

1 Scam. R., 329.

Error to Hancock.

1. In *trespass* for an assault, etc., the venue is transitory.
2. Where in such action the declaration averred, that the assault was committed "at Montebello, in the county of Hancock, etc.," proof that the assault took place five miles from Montebello, will sustain the allegation.

Judgment reversed.

Whitney, for plaintiff.

Ralston, for defendant.

DOE v. SPRIGGINS.

1 Scam. R., 330.

Error to Jo Daviess.

Where parties waive a jury, a bill of exceptions will not lie to the decision of the court, although the parties also agree prior to the submission that either may except as if a jury had been called.

Lockwood, J.—This was an action of *ejectment* brought in the Jo Daviess Circuit Court, to recover the possession of a lot of ground in the town of Galena. The cause was tried by the court, by consent of parties, without a jury, and it was agreed by the parties, "That both

Doe v. Spriggins.

Garrett v. Phelps.

or either party should have the same right to except, as if this cause were tried by a jury."

A bill of exceptions was taken by the plaintiff on the trial, by which it appears that testimony was given by both parties on the question raised on the trial, whether a deed purporting to have been executed by Spriggins to Ballingall, had been duly delivered. The court was of opinion that there was not sufficient proof of the delivery of the deed, and nonsuited the plaintiff. This decision the plaintiff assigns for error.

The point presented in this case for our decision, is whether a bill of exceptions will lie to the opinion of the court, where the court hears the testimony on both sides, and then decides according to the weight of testimony? Had this cause been tried by a jury in the ordinary mode, the bill of exceptions would not have been signed. The judge neither received improper, nor rejected proper testimony, and as there was no jury, there was no misdirection on a point of law. The bill of exceptions, then, according to the decision of this court in the case of *Swafford v. Dovenor*, decided in February, 1835, was improperly allowed.

Judgment affirmed.

Bigelow, for plaintiff.

Gatewood, for defendant.



GARRETT v. PHELPS.

1 SCAM. R., 331.

Error to Madison.

1. THE return upon a summons is the only legal evidence of service, and where no such return appears upon the writ, it is error to take judgment by default.

2. A recital in the record that a party was served with process is insufficient to sustain a judgment by default.

3. A plaintiff acts at his peril in entering a default, and must see to it that he is in a technical position to justify his action.

Judgment reversed.

Sample, for plaintiff.

J. B. Thomas, Krum, and Prickett, for defendant.

Hull v. Blaisdell.

Garrett v. Wiggins.

HULL v. BLAISDELL.

1 Scam. R., 332.

Error to Madison.

1. A JUSTICE has no jurisdiction in suits commenced by attachments, where the demand exceeds \$30.

2. If the justice issues an attachment for a greater sum than \$30, he is a trespasser.

3. A constable who executes the process in such a case, is likewise a trespasser.

4. Where a record or other writing is not the foundation of the action, a variance is immaterial.

*Judgment reversed.**Cowles, for plaintiff.*

GARRETT v. WIGGINS.

1 Scam. R., 335.

Error to Franklin.

1. Courts will not give a retro-active effect to a statute, even when it is not repugnant to the Constitution, unless the words of the law are clearly expressed.

2. The law in force at the time land was sold for taxes, must govern as to the form and effect of the tax deed.

3. Under the revenue law of 1827, a tax deed is not *prima facie* evidence of title in the grantee. (a)

4. Under that law the purchaser must show a strict compliance with its requirements.

WILSON, C. J.—This was an action of *ejectment* brought by Wiggins against Garrett, to recover the possession of a tract of land which was sold to him by the auditor of public accounts, as the property of Garrett for the nonpayment of taxes. On the trial, Wiggins adduced in support of his title, a deed from the auditor, executed in the form prescribed by law, and upon this evidence of title, submitted his cause. The defendant's counsel then moved the court for several instructions as to the law applicable to the case, and the insufficiency of the plaintiff's evidence of title; all of which the court refused, and upon motion of the plaintiff's counsel, gave instructions directly opposite to those asked for by the defendant, as follows:

1st. That the statute in force at the time of the execution of the auditor's deed, and not that which was in force at the time of sale, was the one applicable to the case.

2d. That the auditor's deed is evidence of the regularity and legality of the sale, and in the absence of proof of any other title, the jury must find for the plaintiff, Wiggins.

These instructions were excepted to by the defendant on the trial,

and are now assigned for error. Some other errors were also assigned, which it is considered unnecessary to notice. In order to understand the effect of the first branch of the instructions given by the court, it is necessary to recur to the order of time in which the different acts connected with the plaintiff's title were performed, and also to the different legislative provisions upon the subject.

The sale to Wiggins was made on the 17th day of January, 1829; but the deed was not executed till 1831, after the revenue law of 1829, which had repealed that of 1827, had gone into operation. This last statute is essentially different from the preceding one, upon the same subject, and it is contended, dispenses with proof, on the part of the purchaser at an auditor's sale, of the pre-requisites of the statute. But we are not called upon in this case to give a construction to that statute, as I am clearly of opinion that it is not applicable to this case. Without the clearly expressed intention of the legislature, courts will not give to a law a retrospective operation, even where they might do so without a violation of the paramount law of the Constitution; but no such intention can be collected from the law of 1829. Its language and objects are prospective. It relates only to contracts and proceedings under its provisions, and cannot by a fair construction be so extended, as to interfere with, or impair, prior contracts, rights, or obligations. The fact of the deed's not having been executed till after the statute of 1829 went into operation, has no influence upon the character of the transaction. The statute under which the sale was made, gave to the purchaser, at his option, the privilege of demanding from the auditor a deed immediately, or of taking a certificate of purchase, and waiting for his deed till the expiration of two years. In either case the form of the deed was the same; either would contain the same reservation in favor of the right of redemption, which by the law was two years, where the owner was of age, and in the case of an infant, one year after he became of age. If the purchaser, Wiggins, had demanded and received his deed at the time of sale, I presume it would not be contended that a subsequent law would change its effect and operation. Upon what principle, then, can his situation be different from that of other individuals who purchased at the same time and upon the same terms, but whose deeds were executed earlier. They certainly are all upon the same footing. The auditor's sale constituted a contract between the State and the purchaser, which in connection with the then existing law, determined the rights and obligations of the parties. The certificate of purchase in the one instance, and the deed in the other, are but the evidence of the contract, and that must be construed with reference to the law in force

at the time it was entered into. A different rule would substitute the varying will of after legislatures, for the intention and stipulations of contracting parties. The statute of 1827, then, being the law applicable to this case, its construction presents the next point for consideration. It is a settled principle of the common law, that a party, claiming title under a summary and extraordinary proceeding, must show that all the indispensable preliminaries to a valid sale, which the law has prescribed, in order to give notice to those interested, and to guard against fraud, have been complied with, or the conveyance to him will pass no title. The auditor's authority to make the sale under which the plaintiff claims title, is one of this class. It is therefore incumbent upon him to prove that all the pre-requisites to a legal exercise of that power have preceded it, or he must show that the statute under which the auditor acted has dispensed with the proof of those pre-requisites, or inferred them from the deed of conveyance. In examining the law conferring the authority, and prescribing the manner of selling the land of non-residents, for the non-payment of taxes, it will be perceived that the tax upon land is required to be paid by the first day of August annually, and that the auditor is required, as soon thereafter as practicable, to make out and publish a descriptive list of all lands upon which taxes are due, after which he is required, at the time and place specified, to "sell all the lands advertised as aforesaid, on which the taxes and costs shall remain unpaid." The purchaser at this sale, shall, at his option, be entitled to receive a certificate of purchase or a deed. "Which deed (the law says) shall vest in the purchaser a perfect title, unless the land shall be redeemed according to law, or the former owner shall show that the taxes, for which it was sold, had been paid as required by law, or that the land was not legally subject to taxation."

This act will not, by any fair construction, warrant the opinion that the auditor, selling land without authority, could, by his conveyance, transfer the title of the rightful owner. It is admitted that it is competent for the law-making power to change the rule of evidence, and declare, by an arbitrary rule, that from the proof of certain facts, others shall be presumed. This statute has done so to some extent. Under it several preliminary facts to a legal sale by the auditor, are inferred from his conveyance, and the responsibility of proof shifted from the purchaser to the original owner. But the publication of notice of sale by the auditor, as required by law, is not one of those facts inferred from his deed, nor is the proof thereof thrown upon the former owner. The duty of the auditor to publish this notice is imperative; his authority to sell is limited by the express words of

Garrett v. Wiggins.

Pickering v. Orange.

the law to "the land advertised as aforesaid," and as the rule of law which required the purchaser to show the performance of this prerequisite, was not changed by the act of 1827, he should, therefore, have adduced evidence to that effect. Without proof of this fact, the auditor's deed was not evidence of the regularity and legality of the sale, and consequently conveyed no title to the purchaser, Wiggins, who was the plaintiff below.

Judgment reversed.

Scates, for plaintiff.

Eddy and *Gatewood*, for defendant.

(a) Decisions under the Revenue law of 1827, as to the validity of tax titles, *Hill v. Leonard*, 4 Scam. R., 140; *Irving v. Brownell*, 11 Ill. R., 402.

PICKERING v. ORANGE.

1 Scam. R., 338.

Error to Edwards

The owner of a ferocious or mischievous dog, who suffers him to run at large, with a knowledge of his vicious propensities, is liable for all injuries which occur by reason thereof to the person or property of another.

SMITH, J.—This was an action on the *case* brought by Pickering, to recover damages for the destruction of a certain number of sheep and lambs, alleged to have been killed by the dogs of Orange. The declaration contains three counts. The first alleges that the dogs were accustomed to hunt, chase, bite, worry, and kill sheep and lambs, the defendant well knowing their propensities and habits. The second sets forth the killing of the sheep and lambs; that the dogs were of a mischievous and ferocious disposition, and accustomed to bite, hunt, chase, worry, and kill sheep, the defendant, well knowing, etc. The third count is the same, with the additional allegation, that the dogs were also accustomed to kill hogs, cattle, and other live stock, in addition to sheep.

Issue was joined on the first and second counts, and a demurrer interposed to the third. The Circuit Court sustained the demurrer to the third count, and gave judgment for costs. On the trial of the cause, the plaintiff offered to produce evidence that the dogs of the defendant were of a ferocious and mischievous disposition, and accustomed to bite and worry men and hogs, which being objected to by defendant's counsel, was rejected by the court, to which decision the plaintiff excepted. The errors assigned are that the Circuit Court erred in sustaining the demurrer, and in rejecting the evidence offered. Both errors are well assigned. The third count is sufficient in every particular. The grounds of action, in cases of the present

Pickering v. Orange.

Arenz v. Reihle.

kind, are the vicious and dangerous habits and propensities of the animals kept by the owner, and his negligence in not taking proper care to prevent the commission of injury by them, after a knowledge of their propensities and habits. This has been assigned in the counts, as well as the particular acts done; and the count is not vitiated by the averment that the dogs were accustomed to attack and kill other animals, than those alleged to have been killed. The evidence offered was competent. It tended to prove the issue, and was therefore admissible; and it ought to have gone to the jury. Besides, the ground of the action being the ferocious and mischievous habits of the dogs of the defendant, and his knowledge thereof, and want of care in not restraining them, but permitting them to go at large, it was competent for the plaintiff to show their vicious habits by proof of the attack by them on other animals than the particular ones named in the declaration. The rule of evidence on this point is well settled. It has been held that it may be shown that if the animal had once done mischief in the destruction of one kind of animals, and the owner permit it to go at large, he will be held answerable for other injuries afterward done by the same animal, though of a different kind from that before done, if he knew of the commission of the previous injury.

*Judgment reversed.**Ficklin*, for plaintiff.*Webb*, for defendant.

ARENZ v. REIHLE.

1 Scam. R., 340.

Appeal from Morgan.

1. WHERE the parties waive a jury and try the cause by the court, a bill of exceptions will not lie, though the parties consent in writing.

2. A party cannot assign for error a decision which is not to the prejudice of his rights.

3. A judgment is binding upon parties and privies.

4. A trial of the right of property under the statute is conclusive upon parties and privies.

*Judgment affirmed.**Walker* and *J. B. Thomas*, for appellant.*Wm. Thomas*, for appellee.

Grimsley v. Klein.

McConnel v. Wilcox.

GRIMSLEY v. KLEIN.

1 SCAM. R., 343.

Appeal from Sangamon.

1. A landlord who has distrained his tenant's goods, can be a claimant in a trial of the right of property under the statute.
2. A lease cannot be read in evidence unless made between the parties to the record, unless its execution is proven.

WILSON, C. J.—The record shows that Klein, as the landlord of Bailey, distrained the goods of Bailey for rent due. Those goods were afterward taken in execution at the suit of Grimsley and Levering, and upon the trial of the right of property between Klein, the landlord, and Grimsley and Levering, the execution creditors, Klein, in order to prove the indebtedness of Bailey to him for rent, and his right of property by virtue of his distress, was permitted to read in evidence, without any proof of its execution, a lease from him to Bailey. The reading of the lease was objected to by the counsel of the appellants, but the court overruled the objection, and after hearing all the testimony in the cause, gave judgment in favor of the appellee.

Upon what ground the introduction of the lease, as evidence in the case, was sought to be excluded, does not appear from the bill of exceptions; but inasmuch as it professes to contain all the testimony given in the cause, and as there appears to have been no proof of the execution of the lease, we are bound to say that the court erred in overruling the motion to reject it. Under the statute a party to a written agreement upon which suit is brought, or which is relied upon by way of defence, or set-off, cannot deny its execution except under oath. This statutory provision, it is clear, is not applicable to the present case. The appellants' names were not signed to the lease, nor were they any way privy to it; they therefore had a right to require proof of its execution; and the party offering it was bound to make such proof before it could be legally given in evidence.

*Judgment reversed.**Stuart and McConnel, for appellants.*

McCONNEL v. WILCOX.

1 SCAM. R., 344.

Error to Cook.

1. This cause arose upon an agreed case in the nature of a *special* verdict.
2. The history of the public lands in the Northwest Territory, the settlements and preëmptions thereon, the

McConnel v. Wilcox.

military reservations claimed by the Federal Government and the local laws of Illinois relating to the public lands within the limits of the State, were fully discussed and decided in this cause.

3. The facts in this particular case are detailed in the opinion of the court.
4. The only question in the case was, whether a preëmption right could exist, under any circumstances, upon a tract of land which the Federal Government claimed as a *military reservation*, under an order of the Secretary of War, made and issued prior to the claim of the preëmptor.
5. The decision of the local land officers as to the validity of a preëmption right, is conclusive evidence in behalf of the preëmptor.
6. By order of the chief land officer of the Federal Government, *reserved* lands were *colored* according to their boundaries upon the maps and plats of the department, to indicate the reservation. The land in question was not so colored, therefore the tract described in this record was not reserved from sale on preëmption.
7. A reservation in a Presidential proclamation for the sale of public lands in a particular land district, must state the reservations and must be construed strictly.
8. This is a government of law, and all legislative, executive, and judicial acts can be sustained only when supported by the Constitution and laws of the country.
9. A reservation of public land from sale, because it is necessary for military purposes, must be explicit, and in conformity with law, and must be essential for the uses for which it was reserved.
10. The President of the United States is the chief of the executive department of the Federal Government, and the acts of his subordinates are, in law, his acts, but his and their acts must be in conformity with the legislation of Congress in order to sustain their validity.
11. The executive department of the Federal Government have no power to reserve the public lands, in market, from sale, unless they are expressly authorized to do so by act of Congress.
12. Military reservations are temporary in their character, and when there is no longer a necessity for their use for military purposes, they are subject to the preëmption laws of the United States.
13. Construction of a reservation in a President's proclamation of sale. Such reservation must be interpreted strictly.
14. The presumption of law is that the President of the United States performs his public duties.
15. The definition and characteristics of fraud are specifically set forth in this opinion.
16. The legislature of Illinois have power to determine the evidence of title, legal, equitable or inchoate, to lands which the Federal Government are under obligations to convey to one of her citizens.

SMITH, J.—This was an action of ejectment, commenced in the Circuit Court of Cook county, to recover possession of a part of the S. W. fractional quarter of Section 10, T. 39 N., R. 14 E., on which Fort Dearborn is situated; and was submitted for the decision of the Circuit Court upon an agreed case, in the nature of a special verdict. The Circuit Court, after mature examination of the various points presented in the case, and deliberation thereon, delivered an opinion, in which it decided that the entry and purchase by Beaubien, of the tract of land in question, under the preëmption act, was valid and legal in every respect; but that, for the reason given in its opinion, which will be examined hereafter, he could not assert his right against the "*United States* in the present form of action," and accordingly rendered judgment for the defendant.

To revise this judgment, the present writ of error has been prosecuted.

The principal and direct error relied on by the plaintiff, in this cause, is this portion of the decision of the Circuit Court, and it might, perhaps, be sufficient to merely review the grounds upon which that part of the decision has been predicated; but as the case is marked with

facts which bring into discussion principles of a peculiarly interesting and important character, it has been considered more necessary and proper, to examine the whole case as presented by the record. And here it may not be amiss, in the consideration which is to be bestowed upon it, and to a correct elucidation of the respective rights of the parties to the controversy, to recur very briefly to a review of the history of the public lands in the western States. The whole territory north of the river Ohio, and west of Pennsylvania, extending northwardly to the northern boundary of the United States, and westwardly to the Mississippi River, was claimed by Virginia; and she insisted that the same was within her chartered limits. During the war of the Revolution, her gallant troops, under the command of George Rogers Clark, conquered the country, and she came into the possession of the French settlements at Vincennes, and those situated on the Mississippi River. The States of Massachusetts, Connecticut, and New York also claimed considerable portions of the same territory. Many of the other States, whose limits contained but a very small portion of waste and uncultivated lands, contended that a portion of the immense body of waste lands lying within the territory claimed by Virginia and the other States who had advanced their respective claims to the same, ought to be appropriated, as a common fund, to pay the expenses of the war. Congress, with the desire and hope of composing these conflicting claims and opinions, recommended to the States having these large tracts of unappropriated and waste lands in the now western States, to make a liberal cession to the United States, of a portion of their respective claims, for the benefit of all the States composing the Union. Virginia, acting on the suggestion, on the first of March, 1784, ceded to the United States all her right, title, and claim to the territory northwest of the river Ohio, on certain conditions, some of which were, "that the rights of the old French settlers should be secured, that 150,000 acres near the rapids of the Ohio for her State troops, who had reduced the country, and another of about 3,500,000 to satisfy bounties promised to her troops, on the continental establishment, should be reserved;" but the most important condition of the cession was, that "all the lands within the territory so ceded, and not reserved or appropriated to the purposes named in the act of cession, should be considered a common fund, for the use and benefit of such of the United States as had, or should become, members of the Confederation, Virginia inclusive, according to their usual respective proportions, in the general charge and expenditures, and should be faithfully and *bonâ fide* disposed of for that purpose, and for no other use or purpose whatsoever."

In June, 1786, Congress recommended to the legislature of Virginia to take into consideration their act of cession, and revise the same, so far as to empower the United States to make such a division of the territory of the United States, lying northerly and westerly of the river Ohio, into distinct republican States, not more than five nor less than three, as the situation of that country, and future circumstances, might require; which States should hereafter become members of the Federal Union, and have the same rights of sovereignty, freedom, and independence as the original States, in conformity with the resolution of Congress of the 10th of October; to which revision and alteration so proposed, the State of Virginia, on the 30th of December, 1788, by her legislature, assented; and did ratify and confirm the same, and the 5th article of the ordinance of Congress in relation thereto. New York, Massachusetts, and Connecticut made similar cessions, and thus the conflicting claims of these States were adjusted. This succinct narrative of the manner, and the objects for which these several cessions were made, will be obvious, when the power of the United States to make appropriations of the public domain, and the particular manner in which they may be done, and objects to which such appropriations are applied, shall have been considered.

From the facts disclosed in the agreed case, of which we shall recite such parts as we deem material to be examined and considered, it appears that Beaubien, in the year 1817, bought a house on the fraction of land in question, from one Dean, an army contractor, for \$1,000; also, an inclosure and garden attached thereto, which were in possession of and occupied by said Dean; that thereupon, Beaubien took possession thereof, and occupied the same, and cultivated a part of the inclosure and garden in every year, from 1817 to the 19th of June, 1836; that in 1823, certain factory houses, built on the said land, were, by the order of the Secretary of the Treasury, sold, and one Whiting became the purchaser. In the same year, Whiting sold the same to the American Fur Company; and the said company sold the same to Beaubien for \$500, who took possession thereof, and continued to occupy the same, together with a part of the said quarter section of land, to the date of the commencement of this suit. The occupation and use of the buildings and ground, by Beaubien, was undisturbed and undisputed, by any person whomsoever, from the year 1817 to the time of commencing the present action. It further appears, that upon this state of facts, Beaubien having cultivated a part of the S. W. fractional qr. S. 10, T. 39 N., R. 14 E., and being in actual possession of the part cultivated, on the 29th May, 1830 (the date of the first preëmption law), and that he also cultivated

a part in 1833, was in actual possession, on the 19th June, 1834 (the date of the last preëmption law), and that being thus possessed, on the 7th May, 1831, he made application for a preëmption to the land offices at Palestine, which was rejected, though on the same day a preëmption was granted, at the same office, to one Robert A. Kinzie, for the north fractional quarter of the same section. He also applied, in June, 1834, to the land office at Danville, for a preëmption, which was refused; and he was informed that the tract claimed had been reserved for military purposes; that after the establishment of the land office at Chicago, the President of the United States, on the 12th February, 1835, by proclamation, directed various lands in that district, in which it is admitted the lands in question are, to be exposed to sale on the 15th June, 1835, including the southwest quarter of section 10, unless the same is excepted in the terms used in said proclamation, under the words "The lands reserved by law for the use of schools, and for other purposes, will be excluded from sale." Appended to this proclamation, is a general notice to all persons claiming preëmptions to any of the lands directed to be sold, requiring them to appear before the register and receiver, before the day of sale, and make proof of their preëmption. The commissioner of the general land office transmitted to the land office at Chicago, the extended plat of the lands in the proclamation described, marking and coloring thereon certain lands to be reserved from sale; but no part of fractional section 10, was so marked to be reserved. On the 28th of May, 1835, it further appears that Beaubien applied at the land office at Chicago, and there proved, to the satisfaction of the register and receiver, that he was entitled to a preëmption on said lands, under the act of the 19th of June, 1834; and on the same day entered and purchased, by means of his preëmption, the southwest fractional quarter of section 10 aforesaid, in due form of law, by paying the purchase money, and obtaining the receiver's receipt, and register's certificate of entry and purchase. It also appears, in the agreed case, that the lessor of the plaintiff, duly and formally purchased of Beaubien, before the commencement of this suit, so much of fractional section 10 as is now in controversy, including the stockade and fort, with notice that a controversy existed as to the title of the same.

It further appears that at the commencement of the suit, the defendant, as an officer in the army, with soldiers under his command, occupied the post (consisting of some wooden buildings, and a stockade of pickets agreed to be worth \$3 per month) by orders from the Secretary of War. This post was first occupied by the troops of the

United States, in 1804, and such occupation continued until the 16th of August, 1812, when it was taken by the savages, and the troops all massacred. On the 4th of July, 1816, it was reoccupied by the United States troops, and such reoccupation continued until May, 1823, when it was abandoned by the order of the government, an Indian agent being left in possession. Some factory houses were built on the fraction for the use of the Indian department. On the 10th of August, 1828, it was again occupied by the United States troops, and in May, 1831, evacuated, and left in the possession of a citizen, who authorized another citizen to take possession thereof. In 1832, it was again reoccupied by the troops, and such reoccupation continued up to the commencement of this action. The lands in question were surveyed in 1821. On the 2d September, 1824, the Indian agent, at Chicago, wrote a letter to the Secretary of War, requesting that the tract in question might be reserved for the use of the Indian agency at that place; which letter, it appears, was, on the 30th of the same month, transmitted to the commissioner of the General Land Office, with a request that fractional section 10 aforesaid might be reserved for the use of the Indian department. In reply to this letter, the commissioner, on the 1st of October following, directed that the whole of fractional section 10 aforesaid should be reserved for military purposes. In January, 1834, the commissioner of the General Land Office addressed a note to the Secretary at War, inquiring whether the said fraction was reserved for military purposes, or for the use of the Indian department, and was answered that it was wanted, and then used, for military purposes.

The case also exhibits as evidence the duplicate receipt of the receiver of public moneys of the land office at Chicago, expressing on its face full payment of the purchase money by Beaubien, for the fractional quarter section of land in controversy, under the preëmption act of the 19th of June, 1834; also a certificate of the register of the same land office, stating the fact of purchase and sale, under the same preëmption law, by the same individual; the original of which, it is admitted, is on file in the General Land Office; and another certificate, by the same register, given to the purchaser, stating the fact, that the sale and purchase are matters of record in his office; and lastly, a deed for the premises in question, from the preëmptor to the lessor of the plaintiff. Upon this exhibition of title by the lessor of the plaintiff, and all the facts connected therewith, as disclosed, and the several acts of Congress applicable thereto, and the laws of this State, he insists that he is entitled to recover the possession of the premises sued for; having, as he contends, shown a legal title to the

same, and the right of possession. The defendant insists, 1st, That no action of ejectment will lie against the commander of a fort; 2d, That the fraction of said land in question was reserved, or appropriated by lawful authority, for military purposes; and that, therefore, the land officers had no jurisdiction over it to authorize the granting of a preëmption to it, or to sell it; and that their acts are necessarily void, and convey no title whatever to the preëmptor; 3d, That the legal estate in the land is still in the United States, and that a patent is necessary to be issued before a divestiture of the title of the government can take place; 4th, That the government, though no party to the suit, may assert its right to the ground, through the officer in the possession thereof.

In the investigation proposed to be given to the case before us, the several points, in the natural order in which they occur, with the facts and principles they involve, will be discussed, and such conclusions stated as seem to be justly inferrible therefrom. Adhering to this order, we propose to examine, first, all the essential facts connected with the disposition and title to the land, as set forth on the part of the lessor of the plaintiff; and we are necessarily led to the inquiry, What is the character of the title exhibited? To ascertain this, it will, we apprehend, be unnecessary to particularly enumerate more of the provisions of the various acts of Congress, which provided for the sale and disposal of the public lands, than relate directly to the preëmptions authorized by the laws of 1830 and 1834; and such other acts, as taken in connection therewith, have a bearing on this case; and from which, to ascertain whether the acts of the register and receiver, in this particular case, are within the scope of the powers conferred, and the duties required of them, by law. It cannot, we apprehend, be denied, that if these acts have been confined within the limits of the jurisdiction confided to these officers, such acts must be valid and binding, unless an appeal has been provided for, or a revision of their decision in some other mode is prescribed by law. The Supreme Court of the United States have, in a variety of cases, asserted this doctrine, and particularly in the cases of *Brown et al. v. Jackson*, 7 Wheaton; *Polk's Lessee v. Wendell*, 5 Wheaton; 1 Cranch, 171; 4 Wheaton, 423; 3 Peters, 412; 4 Peters, 563; 2 Peters, 147, 168. That court has said, in these cases, "That the decisions of the board of commissioners, under the acts of Congress providing for indemnification of claimants to public lands, in the Mississippi territory, are conclusive between the parties, in all cases within the jurisdiction of the commissioners:" that as to irregularities committed by the officers of the government prior to the grant, the court does not express a doubt,

but the government, and not the individual, must bear the consequences resulting from them. This court disavows having ever decided more than that an entry, or other legal incipieney of title, was necessary to the validity of a grant issued by North Carolina, for lands in Tennessee, after the separation. They have never expressed an inclination to let in inquiries into the frauds, irregularities, acts of negligence, or of ignorance, of the officers of government prior to the issuing of the grant; but on the contrary, have expressed the opinion that the government must bear the consequences. "It is a universal principle, that, where power or jurisdiction is delegated to any public officer, or tribunal, over a subject matter, and its exercise is confined to his, or their discretion, the acts so done are binding and valid, as to the subject matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying their validity, are power in the officer, and fraud in the party; all other questions are settled by the decision made, or act done, by the tribunal, or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision, by some appellate, or supervisory tribunal, is prescribed by law." Proceeding then to ascertain what those powers and duties are, it will be seen, that by the act of 1830, it is provided that every settler and occupant of the public lands, who cultivated any part thereof in 1829, and was in actual possession, on the 20th day of May, 1830, should be entitled to enter at private sale, a quarter section, to include his improvements.

The act further provides, "That the right of preëmption under this act, does not extend to any lands which is reserved from sale by an act of Congress, or by order of the President, or which may have been appropriated for any purpose whatever, or for the use of the United States, or either of the States in which they may be situated." The act of 1834 provides "That every settler and occupant of the public land, who cultivated any part thereof in 1833, and was in actual possession on the 19th June, 1834, should have a similar right to enter at private sale, a quarter section, to include his improvements." This act, also, revives the act of 1830, and continues it in force for two years. Now, under these acts, what were the duties the land officers had to perform? Were they not to satisfy themselves that the applicant for the preëmption had proven himself an occupant and settler within the provisions of these acts; and had cultivated a part of the tract applied for, according to the requirements thereof. If

satisfied of these facts, and the land was not reserved, or appropriated within the meaning of the recited provisions of the preemption laws, but, on the contrary, had been proclaimed for sale, by the order of the President of the United States, by what right, or the exercise of any other than an arbitrary will, could they have refused to permit the applicant to enter and purchase the tract in question? The proof shows that this land, with others in the district, was ordered for sale, and that while other tracts were designated, by coloring them on the maps as excluded from sale, this tract was not so colored; that no information had been communicated to the officers, from any department of the government, that the land had been reserved or appropriated, or that it in any way fell within the exceptions enumerated in the preemption acts, anterior to the entry, sale, and purchase by Beaubien. In the absence of any such information, they were necessarily bound to decide, that they had no power themselves to withhold it from sale; and had they not granted the preemption to Baubien, by what authority would they have been justified from exposing it to public sale, as they were ordered by the President's proclamation? How were they to determine that the government had not chosen to expose it to public sale, in the absence of all instructions to the contrary, and with no evidence whatever that it was legally reserved from sale, or excluded by the provisions of the preemption acts? An analogous case, which seems to be striking, has been put, and for the sake of illustration, it will be stated. By law, all lands containing lead ore, are reported by the surveyor. If, however, a tract not so reported, should contain lead ore, and not be discovered before the sale, after it should have been duly sold, could the United States annul the sale? It would be difficult to affirm it could, because the officers had jurisdiction to sell, and had no evidence that it contained ore. But the present case is supposed to be much stronger than the one put, as there is an express reservation from sale in the case of lands containing ore, and, as is contended, no reservation by law in the present instance. It might, however, be asked, whether the register and receiver were merely to examine into the cultivation and occupancy of the lands, or whether they were required to ascertain whether the land was public land?—whether it was within the district, and had it been reserved from sale, or appropriated by law to any purpose whatever? If it were their duty to investigate the three latter points, then it seems clear, that they only were to be satisfied on all the questions presented, and that their decision, like that of all other tribunals, where no appeal is allowed, is final and conclusive, upon all the facts submitted to their

examination and decision. This court could not review, or reverse their decision, nor could its propriety be inquired into.

The proclamation of the President had declared that certain lands were reserved from sale; but how were the land officers to ascertain which those lands were? So far as the proclamation had specified them, and as to those which they had been apprised by official information from the proper department of the government, were of that character, there could be no doubt. But as to the ascertainment of others, they must necessarily rest altogether upon extrinsic evidence. And if this supposition be correct, then it necessarily implied a power and jurisdiction, in them, to ascertain and decide all the points stated. It is not deemed important to directly decide the question, as to the authority of the officers to make the three latter inquiries, though the right to investigate and determine all the points, would seem to be admitted by a recent opinion of the constitutional law officer of the General Government, in which he affirms, "That the power of ascertaining and deciding on the facts which entitle a party to the right of preëmption, is exclusively vested in the register and receiver of the land district in which the lands are situated, without any power of revision elsewhere; and that in weighing the evidence, and in deciding on its sufficiency, these officers act in a judicial capacity; if it proves to their satisfaction, that the settlement and improvement required by law have been made, they must allow the entry; if it fails to satisfy them of these facts, they must disallow it. The law has not authorized any other officer to reverse, or revise their decision; nor can they be compelled to decide according to the dictates of any judgment but their own." These views are undoubtedly in accordance with the opinions of the Supreme Court of the United States, already referred to, and, we think, imply full power in the officers to investigate and decide all the points presented. Those of settlement and cultivation, are exclusively and undeniably within their jurisdiction. The assumption that the land officers were bound to inquire into and ascertain, whether the land was not reserved or appropriated, would clearly imply a right of investigation into all the facts connected therewith, and jurisdiction over the subject matter of their investigation; and if so, according to the foregoing views, would be exclusive and final. Waiving this view of the case, let us suppose that the inquiries of these officers were confined to settlement and cultivation only; and that the right of the preëmption depends on the fact, whether the fraction was not reserved or appropriated, in the manner, and to any of the objects specified in the preëmption laws of 1830 and 1834. We take it for granted, that there can be

neither a reservation nor appropriation of the public domain, for any purpose whatever, without the express authority of the law. It cannot, surely, be seriously contended, that the President of the United States, or any of the executive officers in the several departments of the government, possesses an absolute and inherent power to do any official act not authorized by the Constitution or laws of the United States. To the Constitution and laws they must alone look for the source of their power and authority, because they can derive them from no other. The government itself is a limited one, and the great charter under which it exists, has prescribed bounds which cannot be rightfully transcended; and all its functionaries are necessarily restrained by its provisions, and the laws made in pursuance thereof, from the exercise of an authority not granted thereby. If it be considered that the President may reserve, or appropriate the public domain, to any purpose he may in his judgment deem useful to the country, without warrant or authority of law, why may he not, in like manner, appropriate the public treasure for similar objects? The one may be as laudable as the other; but both would be equally unauthorized and illegal. To admit for a moment, that the President, without the authority of law, may direct the application of the public moneys of the nation to even such objects as may undeniably be salutary and highly useful, would be to admit the exercise of a power in direct violation of the Constitution; and yet, the exercise of a power appropriating and applying the public lands to purposes not authorized by law, but in direct violation of the express condition on which they were ceded, and the purposes to which they were solemnly stipulated to be applied, it is contended, is an implied power, rightfully exercised, by an inferior officer of the government, without the assent of the executive of the nation. This position is most assuredly untenable: neither the officer, acting in his own name, or that of the President, nor the President himself, possesses any such authority. To appropriate the public land, seems to us to be an appropriation—at least virtually so—of the treasure of the nation, inasmuch as it is property, and out of which the moneys of the nation are raised by sale.

Admitting, however, for the sake of argument, the power of the commissioner to make the reservation agreeably to the request of the Secretary of War, it will be found not to have been made in conformity to the object required; nor does it appear that any act was ever done, setting it apart from the common mass, for any purpose whatever. No record appears to have been made of it. The letter of the commissioner is only evidence that the act was directed to be done; but

whether it was, or in what manner it was performed, or by whom, it does not appear. As late as 1834, the commissioner of the General Land Office was not aware that it had been reserved, and he accordingly applies to know whether it was wanted ; having probably learnt from other sources than from the archives of his office, that a garrison was on it. Indeed, the frequent abandonment of the post, and subsequent temporary occupation of it, afford strong presumptive evidence, that it never was considered a permanent post, much less a reservation, made for the object of a permanent garrison.

But the commissioner had no such power. On examination of the organization of the General Land Office, it will be perceived that it is constituted, by the act of the 25th of April, 1812, a subordinate office, in the treasury department, and is placed under the immediate direction, supervision, and control of the Secretary of the Treasury ; without his authority, or that of an express law, the commissioner can do no act whatever, much less that of making a reservation of the public domain, or of appropriating it to any object whatever. To make, then, the act of the commissioner valid, in the present case, admitting that the power existed in the treasury department, the commissioner should have acted in obedience to the direction and authority of the Secretary of the Treasury ; but the secretary, for aught that appears, was and remained, in total ignorance of the attempt to create the reservation—never directed it—nor subsequently sanctioned the act of the commissioner. We must therefore come to the conclusion, that the acts of the commissioner of the General Land Office, and of the Secretary of War, in attempting to reserve and appropriate this fraction, were unauthorized, and not warranted by law. It has been said that the act of these officers may be considered as the act of the President, and therefore valid. The President does, doubtless, exercise many of the powers conferred on him by law, through the agency of officers of the executive department ; and had there been an act of Congress, authorizing the President to make reservations of the public lands for military purposes, the argument would have had much force ; but none such has been shown ; and we understand it is conceded that none such exists. Some obsolete laws, authorizing the President to erect fortifications and trading-houses in the Indian country, have been referred to, as authorizing the reservation ; but they are considered as having no application whatever to the case before us. In the absence of any law authorizing the application of the lands in question, to the objects to which they have been applied, it will be remarked, that they were requested to be set apart for the use of the Indian department ; but the commissioner declares that he had

directed them to be reserved for military purposes; a singular discrepancy between the object for which they were applied, and the use to which they are said to have been reserved; and one by no means reconcilable with the intent and objects for which the reservation was sought. Independent of the absence of power in the President, or the heads of the department, to make the reservation contended for, it appears to us that it was not competent for either thus to apply the public domain, because it was not one of the objects for which we have seen Virginia had made the cession. It was agreed by all the parties to the cession, that the land so ceded, "should be considered a common fund, for the use and benefit of such of the United States as had or should become members of the Confederation—Virginia inclusive—according to their usual respective proportions in the general charge and expenditure, and should be faithfully and *bonâ fide* disposed of, for that purpose, and for no other use or purpose whatever." Now can it be contended, that, in direct violation of the terms of this compact between the United States and Virginia, and instead of faithfully applying the land in question to the objects stated, by a *bonâ fide* disposition thereof, the President, of his mere arbitrary will, could appropriate the same, without law, to a use and purpose expressly prohibited. If it were competent for any power whatever thus to apply the land, most certainly Congress could alone give the authority thus to use it; though it might still be questioned, whether such an act could be in conformity to the use and trust upon which Virginia ceded the territory. What would be the legal effect of a violation of the terms of the compact under the deed of cession? Would it not be a reversion of the lands ceded to the original donor? Be the effect what it may, the United States, as the trustee of the States, had no power to divert the funds from the objects of their application, nor to misapply their use in any manner whatever. It may be said, that Congress has, in repeated instances, applied the public lands to objects confessedly without the terms of the grant. Admitting that she has, and that the States, by their representatives, are supposed assenting thereto, and that therefore the objection is removed, does it follow, that because this assent is thus presumed—though in truth, in many instances, it is never given, because on many occasions the whole delegation of a State in Congress, have disapproved and voted against these appropriations—that the President, or a subordinate officer of the government, may, when it is apparent no such assent can be given, do an act which, if it can be done at all, Congress alone possesses the power to do. The Supreme Court of the United States, in the case of Jackson v. Clark, in discussing the principles involved in that case,

having quoted the terms of the deed of cession from Virginia, remark, "That the government of the United States then received this territory, in trust, not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the Confederation, and this trust is to be executed by a faithful and *bonâ fide* disposition of the lands for that purpose." Language cannot be stronger, nor more directly applicable to the case before us, and it shows, most conclusively, that the highest tribunal in the nation sanctions the rule here asserted. In reflecting on this branch of the case, another, and not inconsiderable objection has arisen, in our opinion, to the exercise of the power contended for, which seems to conflict with the spirit, if not the letter, of the 16th paragraph of the eighth section of the first article of the Constitution of the United States, which provides that "Congress shall have power to exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square), as may by cession of particular States, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and all other needful buildings." From the paragraph quoted, it seems apparent that the members of the convention who formed the Constitution, contemplated that places for forts, magazines, arsenals, dockyards, and other buildings connected therewith, would be required to be purchased from individuals, in the several States, where their selection and erection might be deemed necessary; and that it was still more important to give exclusive legislation over the places ceded, for public convenience and safety; but still the consent of the State legislature was required before such purchases could be made of individuals, and the places be so used. May it not, also, have been intended that forts, and permanent garrisons, should not be thus erected without the consent of the State; and that to prevent the accumulation of military power, in such permanent works, the assent of the State legislature should be required, before they could be erected? This view seems to be neither unreasonable, nor overstrained. On the contrary, this inference would be warranted by the supposition that the State authority would view, with natural jealousy, the collection of numerous armed forces, stationed among them in permanent works, established without their consent, and beyond their control; and hence we have seen, that in the cessions made by the States, under this power, there has been a reservation of the right to serve all State processes, civil and criminal, upon per-

sons found therein. If, however, the construction contended for, of that part of the Constitution, is not warranted, then it would seem to follow, that Congress might, and the President too, if it be conceded that he has, without the authority of law, rightfully the power to erect forts, magazines, and arsenals, upon any and all of the public lands within the new States; thus appropriating them to objects never contemplated by the deed of cession, but in positive violation of the trust delegated; and establishing a cordon of military posts within the body of a State, without its consent, and against its inclination. The view we have taken, denying this power, is greatly aided by an act of Congress of the 3d of March, 1819, "*Authorizing the sale of certain Military Sites*," which provides "That the Secretary of War be, and he is hereby authorized, under the direction of the President of the United States, to cause to be sold, such military sites belonging to the the United States, as may have been found, or become, useless for military purposes; and the jurisdiction which has been specially ceded for military purposes to the United States, by a State, over such sites, shall hereafter cease." This act, it will be perceived, relates exclusively to such sites as had been found, or had become, at the time of the passage thereof, useless; and it is evident that Congress did not, from the very phraseology of the act itself, contemplate, that any other military sites existed, but such as had been purchased of individuals by the consent of the State legislatures, by the retrocession or cessation of the jurisdiction before ceded by the States. The idea never occurred, that the public lands had been permanently appropriated to such purposes; but that the occupations, in such cases, were merely temporary, and terminated with the cause that produced them. It is not very probable that such a state of things would be likely to occur; yet, if the reasoning in this case, for the defendant, be correct, it would seem inevitably to lead to such conclusions. It cannot be, that reasons and inferences, drawn from the exercise of implied power, can be either sound, or just, which would tend to consequences so dangerous and liable to abuse, if not affording means to him, who, should he be so disposed, might overturn, in succession, the sovereignty and independence of all the States. Satisfied, however, that there has been no act of Congress passed, expressly reserving from sale the particular tract of land on which the stockade called Fort Dearborn is situated, and appropriating it to military purposes; and that the President has not made any order previous to the passage of the preëemption laws, reserving this tract for such objects; and moreover, considering it as admitted, that the Commissioner of the General Land Office, or any other officer of the government, was not

authorized, in any way whatever, to make the reservation contended for; and that there is nothing in the general laws regulating the sale of the public land, and conferring the powers, and prescribing the duties of the public officers of the United States, to sanction, much less authorize, this act of reservation, and that it is not confirmed by the reservation in the preëmption laws, we must arrive at the conclusion, that the reservation, if there was one at the time and manner in which it was made, was unauthorized by any law of the United States, or any other legal authority whatever, and that it could not be included in the reservations named in the President's proclamation. A further and necessary inquiry remains to be made, to ascertain whether the land officers had jurisdiction over this particular tract, for the purpose of allowing the preëmption, and making the sale to Beaubien, supposing it admitted that they could not determine themselves the question of reservation, or no reservation. We have satisfied ourselves that the land was not reserved from sale by an act of Congress, or by order of the President of the United States. Let us now consider whether it has been appropriated for any purpose whatever; or for the use of the United States, or for the use of the State of Illinois. It has been shown, we think, satisfactorily, that no act of Congress exists, making the reservation contended for; and we take it for granted, that there is no such act appropriating the land, in any manner whatever. It seems equally certain, in our judgment, that an appropriation of the public domain can no more be made by the President of the United States, or any subordinate officer acting under him, without the warrant of law, than in the case of a reservation. Indeed, the objection is stronger; because, as we understand the use of the terms, the word "reservation" does not imply an absolute disposition of the lands, in all cases, but a withholding of them from some other disposition, such as sale, or for the use of schools, and other objects. While, on the contrary, the term "appropriation" would imply, most clearly, a setting apart, or application to some particular use; when applied in reference to the public revenues, it will be seen, that in the Constitution of the United States, it is used to express the disposition of the public moneys from the treasury by law. The phrase is, "No money shall be drawn from the treasury, but in consequence of appropriations made by law." As to the meaning of the term, in the sense, in which it is used in the preëmption law, we suppose we shall best ascertain that sense, by comparing it with the context of the section itself: It will be seen, that it is applied in a general sense; first—the words are, "or which may have been appropriated for any purpose whatever;" secondly—"or for the use

of the United States;" thirdly—"or either of the States, in which they (the lands) may be situated." Now let us inquire, by what power can the public lands be appropriated to a State in which they may be situated? Certainly not by the order of the President of the United States; but most clearly alone by the authority of an act of Congress; nor could the same lands be appropriated to the use of the United States, without such authority; because, we have shown, that certainly without the assent of the representatives in Congress of the several States in the Union, the lands could not be appropriated, or in other words set apart, or applied to, the use of a State in which they are situated; nor to the use of the United States. In what manner, and by what means, other than the authority of an act of Congress, could they be appropriated, set apart, or applied to any other purpose whatever? Surely, if it could not be legally and justly done in the one case, it could not, most clearly, in the other. It is, in our judgment, entirely useless to discuss the precise meaning of the term "appropriated," in its general and extended sense; because its meaning and application, in the manner it has been used in the preëmption law, cannot, we think, admit of a doubt. It means nothing more, in the sense in which it is used, than an application of the lands to some specific use or purpose, by virtue of law, and not by any other power. The next, and, in our view, most important feature in this cause, which remains to be considered, is the 4th section of the act of Congress, creating the land office at Chicago, passed on the 29th June, 1834, which contains the following provisions:

"The President shall be authorized, so soon as the survey shall have been completed, to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said land district, at the land offices in the respective districts, in which the land so offered is embraced; reserving only section 16 in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals, and such reservations as the President may deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding."

The President of the United States, in directing the sale of the public lands, by his proclamation of the date of the 12th of February, 1835, in this district—and in which it is admitted the land in question is situated—to be holden on the 15th of June, 1835, at Chicago; and among which lands the S. W. fractional quarter of Section 10, T. 39 N., R. 14 E., was included, made no other exception in his proclamation of lands excluded from sale, than is contained in these words: "The lands reserved by law, for the use of schools, and for other pur

poses, will be excluded from sale." From the character and tenor of this proclamation, taken in connection with the 4th section of the act creating the land office at Chicago, and the duty devolved on the President, by the provisions of that section, it is impossible to conceive, that in the proper discharge of his duty, specifically enjoined thereby, he had not examined, and ascertained, that the site in question was not necessary to be retained for military purposes. The words of the act, it will be perceived, are, that the President shall cause "to be offered for sale, in the manner prescribed by law, all the lands lying in the land district, in which the lands so offered are embraced; reserving only section 16 in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals, and the State of Illinois; and such reservations as the President may deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding." Can it be supposed, when the act declared, that notwithstanding any law of Congress heretofore existing to the contrary, all the lands in the district, except those specially enumerated, should be offered for sale, unless the President should determine that some portion thereof was necessary to be retained for military posts, that under his proclamation, made in pursuance, and in accordance with that act, any military post had been reserved. Is it not more consonant to reason, and a just interpretation of his acts, in reference to this matter, that as the law had confided to his judgment and discretion, the decision of the question, whether such military posts were necessary to be retained, he had, on full consideration of the subject, determined that the land in question was not necessary to be so retained. The act, by its very terms, contemplates the possible disposition of such reservations; and that cases might exist, where it might promote the public interest so to dispose of them. The language of the act, unless thus interpreted, would be idle and unmeaning. The legal presumption is, that the President discharged the public duty imposed on him by the terms of the law, and that the land was in market, as proclaimed by himself; and as is further established by the extended plat furnished to the land officers; and on which there was no evidence by coloring (the process used and adopted in other cases to note reservations), or other marks, that it was reserved from sale. In a further view to be given to the provisions of this 4th section of the act, establishing the Chicago Land Office, it is most evident, that the law intended to subject all such reservations to sale, as the President might decide not necessary to be retained for a specific and de-

finéd object ; to wit—military posts ; so that under this act, it would seem to be a matter of no importance, whether the fraction had been reserved by law or not. It was to be offered for sale, if the judgment of the President determined it not necessary to be retained ; such, in our opinion, is the only admissible and just interpretation of that section. The latter words of the proclamation cannot exempt the lands from the general operation of the order to sell, for the exclusion from sale is only of such lands as are reserved by law for the use of schools, and for other purposes ; and the 4th section of the act recited, declares that these reservations by law shall be inoperative in certain cases, if the President determines that they are not necessary to be retained. Upon this view of the facts, and the law relating to the case before the court, it is difficult to conjecture upon what grounds the land officers can be supposed to have exceeded their jurisdiction, and that their acts are necessarily void ; we confess we are at a loss, in whatever aspect the questions affecting the legal rights of the parties are considered, to see the least excess of jurisdiction ; nor can we imagine how the officers can be liable to the charge, or in any way censurable for their acts. There are, however, other additional grounds, which seem to have a direct bearing on the case, and in our judgment, recognize the legal character of the entry and purchase by Beaubien. It will be recollected that the case shows that the north fractional quarter of this identical fractional section 10, which the commissioner of the General Land Office directed the whole of to be reserved for military purposes, was, on the 7th day of May, 1831, entered at the Palestine Office, by one Robert A. Kinzie, by virtue of his preëmption right, purchased and paid for by him, at the minimum price, and has since been patented. Now, how is it, if the reservation contended for was duly and legally made, and embraced (as it is undoubtedly contained) in the description of the supposed reservation made by the commissioner, that in the one case the reservation is effectual, as is contended, to bar the right of entry and purchase by preëmption, and not in the other ? On the facts of the case, it is wholly irreconcilable with a just interpretation of the rights of these parties ; and the recognition by the government, in the case of Kinzie, must be considered as a clear interpretation, by itself, that there was no legal reservation whatever ; because, if there was, the entry and purchase of the north fraction of section 10, by Robert A. Kinzie, being a part of the same fraction, was necessarily as much inhibited by law, as that of Beaubien's could be. By this act, the government has manifestly put its own interpretation on the character of the supposed reservation, and admitted, we think, thereby, that it was alto-

gether nugatory as such. On the 2d July, 1836, an act of Congress was passed, entitled "*An act to confirm the sales of the Public Lands.*" The first section of this act of the 2d of July, provides, "That in all cases where public lands, taken from the bounds of a former land district, and included within the bounds of a new district, have been sold by the officers of such former district, under the preemption laws, or otherwise, at any time prior to the opening of the land office in such new district; and in which the commissioner of the General Land Office shall be satisfied, that the proceedings, in other respects, have been fair and regular, such entries and sales shall be, and they are hereby confirmed; and patents shall be issued thereupon, as in other cases. The second section declares, "That in all cases where an entry has been made under the preemption laws, pursuant to instructions sent to the register and receiver, from the treasury department, and the proceedings have been in all other respects fair and regular, such entries and sales are hereby confirmed, and patents shall be issued thereon, as in other cases." The first section was evidently intended to cure cases of defective jurisdiction, where the officers of the former district had sold lands under the preemption laws, or otherwise, lying in the new district, and prior to the opening of the land office in the new district. But the second section provides for another class of cases. From the extreme generality of the language used, the section must apply to all cases where the officers allowing the preemption, have proceeded agreeably to the instructions sent to them from the treasury department; and the proceedings in the words of the act, have been in all other respects fair and regular. It is, however, urged that this section has no application whatever to the case before the court. Let us inquire whether this affirmation is true? Upon the supposition that there was no reservation nor appropriation of the fraction of land in controversy; and that the President of the United States had determined that the land was not necessary to be retained for a military post, and that, by his proclamation, it had been offered for sale according to law; we ask whether it would not have been liable to be entered under the preemption law of Congress; and whether an entry and purchase so permitted by the officers of the Chicago land office, who had entire jurisdiction in the case, would not have been in pursuance of the general instructions (special ones are not and cannot be allowed) sent to the register and receiver from the treasury department? And moreover, whether it could be denied, upon proof entirely satisfactory to those officers, of the undeniable right of the applicant to the right of preemption, that the proceedings in the present case could

possibly be determined to be other than fair and regular in all other respects? We confess that we are at a loss upon any rational principle of induction to determine otherwise: Consequently, in this act of Congress, we find a full, complete, and entire recognition of the validity of the entry of the tract of land in question by the applicant; and that, as such, he is upon every principle of legal right and moral justice, entitled to the lands agreeably to the laws of the United States, providing for the disposal of the public domain. We have, however, the construction of the constitutional law officer of the government, on the provisions of this act in an opinion, under date of the 10th of August, 1836, addressed to the Secretary of the Treasury, wherein he remarks, "I would observe, that as the second section (meaning of the act above quoted) is enacted in connection with a provision curing certain specified irregularities, the irregularities so cured, must be deemed totally excepted from the second section, and that the same principle must be applied to the first section. That is to say in the case provided for in the first section, the patent should be issued, provided the proceedings have been fair and regular in all particulars, other than that provided for and remedied in the second section; and in the case provided for in the second section, the patent should be issued, provided the proceedings have been fair and regular in all particulars, except that remedied in the first section." Then we understand by this illustration of that act, if under the second section, the lands were within the district of the officers offering them for sale, and the proceedings have been fair and regular, that then there is no doubt that a patent should issue. We may be permitted to ask if this construction be a fair and rational interpretation of the intention of the law-maker as evidenced by the second section of the act, whether this section remedied any preëxisting defect in the entries it professes to cure and confirm? It would seem, under such a construction, as we understand it, to have been a nugatory and useless act of legislation; but admitting the construction to be correct, still we conceive that it was a direct confirmation of such preëmptions as had been regularly obtained, and sanctioned every allowance by the land officers of a preëmption so by them granted. Whether the act was absolutely necessary to secure the right, it is unnecessary now to inquire. The effect alone is to be determined; and it must be considered as a legislative sanction of the right granted to preëmptors. The terms of the section are general. In all cases where an entry has been made under the preëmption laws, pursuant to instructions sent to the register and receiver from the treasury department, such entries and sales are confirmed. This is a universal confirmation of all cases

of the regular purchase of land under preëmptions. The next question to be considered, is, whether there was fraud in obtaining the preëmption by Beaubien? And here we are first to inquire what is fraud, and in what does it consist? It is defined by all judges, jurists, and commentators on law, "That to constitute actual fraud between two or more persons, to the prejudice of a third, contrivance and design to injure such third person by depriving him of some right, or otherwise impairing it, must be shown; actual fraud is not to be presumed, but ought to be proved by the party who alleges it; and if the motive and design of an act may be traced to an honest and legitimate source, equally to a corrupt one, the former ought to be preferred." It may consist in making a false representation with the knowledge at the time that it is false, with a design to deceive and defraud, or in the willful concealment of the truth for a similar purpose. There is nothing appearing in the case imputing to Beaubien any false or fraudulent representations in regard to his claim, or the facts upon which he founded his right to his preëmption; nor does it appear that he concealed at any time from the knowledge of the officers with whom he communicated, any fact, whatever, necessary to a fair understanding of his claim, and the supposed right of the government, under the reservation, as made at Washington. Equally free from, and above all suspicion, is the conduct of the officers granting the preëmption to him. No design or contrivance is imputed to any of the parties in the transaction, and none has been shown; because none has been attempted. The transaction is admitted to have been untainted, and above the breath of suspicion. For aught, then, that we can see, it must follow, upon a consideration of all the facts of the case, and laws applicable to it, that this preëmption was duly and formally granted, by an authority having exclusive jurisdiction and power over the subject matter upon which it acted at the time; and that it is conclusive and binding on the government. Having thus far, in the investigation of the legal character of the claim advanced by the lessor of the plaintiff, necessarily considered and examined the objections urged in the defence, except the first, third, and fourth, we proceed to the consideration of those, and the arguments advanced by the counsel for the plaintiff's lessors, in support of the legal title, and a right to maintain the present action. The first objection, that no action of ejectment can be sustained against a military officer, in the occupancy of lands, as such, is readily disposed of. In the case of *Meigs and others v. McClung's Lessee*, in an action of ejectment, brought to recover a tract of land which was claimed under a grant from the State of North Carolina, upon which the defen-

dants resided, as officers, and under the authority of the United States, which had a garrison there, and had erected works, at an expense of thirty thousand dollars, one of the grounds of the defence was, because the land was occupied by the United States troops and the defendants, as officers of the United States, for the benefit of the United States, and by their direction. Chief Justice Marshall, in delivering the opinion of the court in that case, says: "The fact that the agents of the United States took possession of the land lying above the mouth of the Highwassee, erected expensive buildings thereon, and placed a garrison there, cannot be admitted to give an explanation to the treaty which would contradict its plain words and obvious meaning. The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence, and without compensation." The defence is not tolerated for a moment; such an act was clearly military usurpation, and illegal and indefensible in every point of view in which it could be placed. This objection, then, is necessarily altogether untenable. We are not yet prepared to admit the maxim, "*Inter arma leges silent.*" The remaining questions are, we admit, of much moment, and involve principles of deep interest. These objections having been sustained in the Circuit Court, for whose legal learning and accurate judgment we entertain the highest respect, has rendered it more important to examine cautiously the principles upon which this decision is made; and we are free to confess, that nothing but a firm and settled conviction of the soundness of their character, and the evident justice in which they are founded, has led us to adopt them as the basis of our deliberate judgment. In examining the question whether the legal estate is yet in the United States, or has passed by law, and the acts of the land officers, to the preëmtor, it may be well to consider the character of the proof offered, as evidence of a legal title. The first two certificates produced in evidence, bear date on the day of purchase, and are required by the several acts of Congress relating to the sale and disposal of the public lands. The second of these, is in strict conformity with the mode pointed out by Congress, for the primary disposal of the public domain, and should be considered a regulation provided by them for securing the title to the *bonâ fide* purchaser. The third is the same as the preceeding, except that it is not issued at the time of the purchase; nor is it required to be filed in the General Land Office, but is made evidence of title, in an action of ejectment, in this State, by an act of the General Assembly, "declaring what shall be evidence in certain cases," and to which we shall have occasion hereafter to advert; and lastly a deed from

the preëmtor to the lessor of the plaintiff. It is insisted by the defendant, that as the law of Congress provides that a patent shall issue on this final certificate, that the United States cannot be concluded by any other evidence less than a patent. It will be recollected that neither Congress, nor the legislature of this State, have made a patent evidence of title. That it is evidence, in courts of law, and of a conclusive character, where the power granting had title to the lands granted, and the officers authority to issue it, no one doubts; but it is certainly true, that there may be other evidence of title, equally conclusive. The patent is not understood to be the title itself, but the evidence thereof. From what source does the title to land derived from a government spring? In arbitrary governments, from the supreme head—be he the emperor, king, or potentate; or by whatever name he is known. In a republic, from the law, making, or authorizing to be made, the grant or sale. In the first case, the party looks alone to his letters patent; in the second, to the law, and the evidence of the acts necessary to be done under the law, to a perfection of his grant, donation, or purchase. If a grant should be made by the Executive of the nation, for a tract of land, to an individual, by patent, not warranted by a previous act of Congress, it must be void the moment it is made, because it is not authorized. The law alone must be the fountain from whence the authority is drawn; and there can be no other source. It will be found that numerous cases exist, of legislative grants to States and individuals, by Congress, where patents have not been required to be issued; and in which cases, we learn, the practice, if we are rightly informed, is not to issue them. How is it with reference to grants of the 16th section in each township of the public lands, those made to States for internal improvements, for schools and colleges, and of salines and towns, and various other public objects? Will it be contended, that in these cases, the legal title in the lands is not vested according to the terms of the grant, from the moment it becomes a law, in the party to whom the grant is made, but remains in the government until a patent shall be issued? Surely not. We take it for granted, that in cases of legislative grants, the law is not only evidence of the title but the title itself. "A legislative grant vests title which cannot afterward be divested by legislative action." We esteem it unnecessary to pursue this illustration further; but proceed to consider whether the grants of lands made to preëmtors, under, and by virtue of the preëmption laws of the United States, are not estates in the lands intended to be granted, upon conditions, and which become absolute upon the performance of those conditions? Such would seem to be the spirit and intent of

those laws, when attentively considered. We are to look at the beneficial character of those acts, and the peculiar objects they were intended to protect and secure. A class of enterprising, hardy, and most meritorious and valuable citizens had become the pioneers in the settlement and improvement of the new and distant lands of the government. Disregarding the privations, toils and sufferings incident to their condition, they had, by their perseverance, not only expelled the savage from their borders, but had carried civilization, with all its attendant lights and blessings, into the wilderness. By their industry and untiring exertions, they improved the lands, subdued the forests, and by the acceleration which they had given to population and agriculture, increased the value of the lands in a tenfold degree. The government, as a reward for these exertions, granted to the individuals thus situated, rights on these lands, to a certain number of acres, upon proof of settlement and cultivation, and the payment of the minimum price of the public lands, within the time specified in the preëmption laws. It may be worthy of inquiry here, whether, upon a full compliance of a party with the terms and conditions of these laws, that right so given, can be any more divested than an express legislative grant, without any conditions whatever? Certainly not. It is not, then, an estate resting on a contingency, which, if it happen, or be consummated, vests the estate in fee?

Congress possesses the power to grant away these lands, absolutely or conditionally, and they have done so in the case of the preëmptioner, upon conditions specified in the preëmption laws; but it is said that this is only a previous right of purchase. Concede this, and what does it establish? That there is a right, and that right is, that the party who settled and cultivated the land within a given period of time, on proof thereof to the officers of the government, to their satisfaction, and payment of the money required therefor, shall be the purchaser and hold the estate. Now will it be denied that this is an interest in land—imperfect it may be—but to become perfect and absolute on performance of the conditions prescribed? When those conditions have all been performed, and the certificates of the land officers, which evidence those facts, have been executed and delivered, has not the grant, which under the law was provisional, become perfect and absolute; and is not the law the source, and these evidences of the conditions performed, proof of his title, and as much so as in the case of an absolute grant? Congress, in its legislation on the subject of preëmtions, in various acts, speak of the preëmtors as persons having rights, and state in certain

cases that their rights shall be forfeited. We understand, also, that it has been the practice of the land office department, at Washington, to permit assignments of the certificates, and to issue patents where the assignment is in conformity to the rules prescribed, to the assignee, and that it so appears on the face of the patent. This is stated as some evidence at least of the character of the interests in these certificates, as understood by the government itself. The act of the 18th of May, 1796, however, expressly authorized the patent to issue to the heirs or assignees of the purchaser. A case of illustration will now be put. A is appointed to office, by action of a legislative body, in pursuance of powers derived from the constitution of the State: Would the action of this body be the source of his right to the office, or would such source be his commission? Would not his commission be only evidence of his title to the office, and the election by the legislature, the source of his right? Certainly so, because a commission might be issued to a person not so elected, who in such case would be a mere usurper.

We are led to the conclusion that the laws of Congress by every fair interpretation must be considered as saying to every preëmtor on the public lands, if you show yourself within the provisions of the preëmption laws, and that you have honestly and truly performed the conditions required of you by law, the interest or estate which has been provisionally given you, shall become absolute. It may be further asked, whether this right, be it an estate in the lands on conditions performed, or a mere right of previous purchase, can, where it clearly exists, be taken away or destroyed, against the will and consent of the party entitled to the preëmption? Clearly not. The government is committed by its own voluntary acts, and no third party can interfere with, or impair, or destroy it. A case of seeming analogy has been decided in this court. We refer to the case of Doe on the demise of *Moore v. Hill et al.*, decided at the December term, 1829. The lessor of the plaintiff, in that case, claimed title to a tract of land sold by the government of the United States to Hill, who had purchased the same at the public sale, and obtained a patent therefor, by virtue of a confirmation made by the governor of the territory northwest of the river Ohio, in pursuance of the acts of Congress of 1788, and the instructions to the Governor of said territory. In that case the following points were settled: 1st. A confirmation made by the governor of the Northwest Territory, on the 12th of February, 1799, to a person claiming a tract of land in the said territory, is, under the resolution and instructions of Congress of June and August of 1788, valid, and operates as a release on the part of the United

States of all their right. 2d. Under this power to confirm, the governor was not limited to any definite number of acres, but could confirm to the extent claimed by the settler. 3d. A confirmation so made by the governor, cannot be nullified by any act of Congress. 4th. In order to show the act of confirmation, it is not necessary that any evidence should be given of their title to the land, because the power of the governor was plenary, and his decision on the claim presented to him, is binding on the United States. 5th. By the deed of cession of 1784, from Virginia to the United States, Congress was obliged to confirm the settlers in their possessions and titles. By an examination of this case, it will be seen that by an act of Congress passed sixteen years after the powers given to the governor of the Northwest Territory, to confirm the lands referred to in the act creating his duties, a board of commissioners was appointed to sit at Kaskaskia, to hear proof relative to British and French grants, and report to the Secretary of the Treasury. The court say, "That this board virtually superseded the powers of the governor, but nothing appears from the acts of Congress, in disapprobation of the proceedings of the governor, until the passage of an act on the 20th of February, 1812, which authorized the register and receiver of the land office at Kaskaskia, and another person to be appointed by the President of the United States, to examine and inquire into the validity of claims to land in the district of Kaskaskia, which are derived from confirmations made, or pretended to be made, by the governor of the northwestern and Indiana territories respectively, and they shall report to the Secretary of the Treasury, to be laid by him before Congress." The court proceed to say, "That the soundest principles of policy, as well as good faith, require that the governor's confirmations should be considered, at least, *prima facie*, valid. The report of the commissioners is next adverted to, and it is further stated, "That the Secretary of the Treasury considered those confirmations void, and directed the sale of the lands; but the Secretary of the Treasury had no power to order the sale of any lands except those belonging to the United States;" and his act in ordering the sale, is treated as a void act; and it is further said, "That the confirmation was a release of the interest of the United States, and the presumption was, that the deed of confirmation was made in a case authorized by the resolutions of June and August, 1788." To our minds, there is, on principle, an analogy in the two cases, so far as the acts and discretionary powers of the agents of the government are to be viewed, and the character in which these acts are to be considered in point of evidence relating to titles to land originally held by the government, or claimed to be so

held. In the case referred to, the certificate of confirmation by the governor, is held to be at least *prima facie* evidence of title to the estate in the lands claimed; and in the present one, it is not perceived why the same rule should not obtain. The patent of the government to a subsequent innocent purchaser, is held invalid; because the government could not grant the same land twice; and because the patent for that reason was void. In the case of the *United States v. Arredondo*, the Supreme Court of the United States held this language. "If it was not a legal presumption, that public and responsible officers claiming and exercising the right of disposing of the public domain, did it by the order and consent of the government in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite." "The acts of public officers in disposing of public land, by color or claim of public authority, are evidence thereof, until the contrary appears by the showing of those who oppose the title set up under it; and deny the power by which it is professed to be granted. Without the recognition of this principle, there would be no safety in title papers, and no security for the enjoyment of property under them." The law of Congress requiring patents to issue, was passed when the old credit system of disposing of the public lands existed, and that patent was to issue on the certificate of final payment. We think it important that the laws providing for the sales of the public lands, under the old and new system, should be noticed, and the distinction kept in view. Under the old system, the purchase being on credit for three-fourths of the purchase money, was contingent; but under the present it is for cash in full, and perfect and absolute. The patent was, however, on the final payment, to be issued to him, or his heirs, or assigns. It may be important, as an early evidence of the intentions and views of Congress on the subject of the sales of the public lands, and to show in what light they considered the sales thereof, to note the act of the 18th of May, 1796. After prescribing the terms on which the land shall be sold, it directs the form of the certificate which shall be given, and requires the land sold to be described—the sum paid on account,—the balance remaining due—the time when such balance becomes payable, and that the whole land sold will be forfeited if the said balance is not then paid; but that if it shall be duly discharged, the purchaser or his assigns, or other legal representative, shall be entitled to a patent. "On payment of the balance, a patent is directed to be issued. It declares, if there should be a failure in any payment, the sale shall be void, all money theretofore paid on account of the purchase, shall be forfeited to the United States; and the land thus sold,

shall be again disposed of in the same manner as if a sale had never been made." Here we see that a direct and positive sale is recognized, and the land sold in case of nonpayment of any part of the balance, is declared to be forfeited.

It is manifest, from this language, that Congress considered the purchaser as having a legal estate in the lands purchased, of some description, under this certificate; otherwise they would not have declared in what cases the land should be forfeited. Such, however, seems to be the whole course of legislation on the public lands, and in almost every act the right acquired by the purchaser seems to be viewed as a conditional or absolute estate in the lands; and the invariable practice has been for the purchaser under all the systems and regulations for the sale of these lands, to enter into possession of them, either before or after the purchase, if he so desired. It would be singular indeed, if the purchasers of the millions of acres of the public domain, which have been recently paid for by them, and for which they have received the evidence thereof, from the public officers of the government, should be told that they had only some inchoate, indefinite, and imperfect and equitable title to the lands thus sold by the government, and that the legal estate was yet in the government; and that as the government could not be coerced by suit to issue a patent, and the public officers might use their discretion to issue or not issue the patent, intruders on the lands could not be removed, and might enjoy unmolested the possession thereof, committing what destruction and injury they pleased, until they could produce a formal patent therefor. The mere statement of such a supposition would have a most startling effect; and those thus situated would indeed gravely ask whether they lived under a government of laws in which justice was equally dispensed, and the rights of all protected alike? To silence forever and put at rest these quaint and refined subtleties, and to protect the purchasers of the public domain within the limits of this State, the General Assembly, with a forecast worthy of all praise, as early as 1823 (and which was incorporated in the revised code of 1827), passed "*An act declaring what shall be evidence in certain cases.*" By the fourth section of that act, it is provided "That the official certificate of any register or receiver of any land office of the United States, to any fact or matter of record in his office, shall be received in evidence in any court in this State; and shall be competent to prove the fact so certified. The certificate of any such register of the entry or purchase of any tract of land within his district, shall be deemed and taken to be evidence of title in the party who made such entry or purchase, or his heirs or assigns, to recover the possession of the land described in

such certificate, in any action of ejectment or forcible entry and detainer, unless a better legal and paramount title be exhibited for the same." To this statute this court has, in the case of *Bruner v. Manlove*, given an exposition by the unanimous opinion of the court, which every day's experience shows to be based on the firmest principles of policy and justice. In that case it was said, "That the register's certificate is raised to as high a point of evidence in this form of action, as a patent possibly could be. Its effect is to be the same, and the rights derived from it, for the purpose of recovering or maintaining possession of lands described in it, are co-extensive with the most formal regularly issued patents. These certificates not only vest the title acquired by purchase from the government, in the purchaser for the purpose named, but make that title transmissible to the heirs or the assignee. For any purpose, then so far as regards the character of these certificates, as evidence in an action of ejectment, they must be considered of as high a dignity as patents, and partaking of all their legal attributes. Having settled their character and effect, the rights of the parties under them must be governed by the same rules of interpretation as in the case of patents. No reason can exist for an exception." Whatever doubt may have existed as to the character of the right or interest acquired by the purchaser of land from the government of the United States, and the light in which the certificates of the land officers should be considered as evidence in the courts of this State, we apprehend has been forever put to rest by this necessary and provident law. We appeal to the unsophisticated and sober judgment of every rational and unbiassed mind, and ask, whether the idea that purchases so held by these evidences of title, which have doubtless passed through various and numerous hands, are to be for a moment thus impaired by the toleration of such arguments against their validity? It is a matter of universal notoriety, that these are the only evidences of title, in nine cases out of ten, held by the purchasers of the public lands, for some years past; and that it has become, and will remain, impossible, for years to come, under the present force in the General Land Office, to issue patents for millions of acres of land thus purchased. The necessity of the case, then, most imperiously admonishes us of the profound wisdom and necessity of the act. It has therefore been considered altogether unnecessary to refer to, and adduce the numerous decisions of the various courts in the United States, departing from the rigid doctrines of the common law as to what should be considered evidence of title in an action of ejectment. Among which the most prominent is, the case of *Sim's Lessee v. Irvine*, in which it was adjudged that payment of the pur-

chase money to the State, and survey of the land, gave a legal right of entry, and was sufficient evidence in an action of ejectment. The Supreme Court of the United States, in reviewing this case, say, "This having become in Pennsylvania an established legal right, and having incorporated itself as such with property and tenures, must be regarded by the common law courts of the United States in Pennsylvania, as a ruling decision." Numerous other cases might be cited, decided by the Supreme Court of the United States, in which it is held that evidence of title to land, is to be governed by the "*Lex loci rei sitæ*." That the law of the State where the land lies, is to govern both as to the form of the remedy and the evidence of title, seems to be so well settled by a long and uniform course of decisions, that we have supposed it beyond the possibility of doubt. The Circuit Court have, in our opinion, fallen into an error on this point, which has, in our judgment, arisen from the light in which it has viewed the præemptor's purchase. It seems to have confounded this purchase with the imperfect, uncertain, and anomalous modes heretofore pursued in acquiring lands in the States of North Carolina, Kentucky, and other States of the Union, where those States were the proprietors of the soil; and it has adopted the opinion of the Supreme Court of the United States on those inceptive and inchoate titles, as the rule to be applied in the present case, without regarding the manifest distinction. In these cases, the person entering was to procure a warrant of survey, and pay money at a future day; and from the inception of the title by entry, his right, though it might be considered legal, was necessarily inchoate. In the case before us, the purchase and acquisition of the title is an entire act, performed at one and the same time; the certificate, as evidence of that purchase and acquisition, is given on the payment of the consideration money, and the sale being completed, the title passes, and the certificate is evidence thereof, at least *primâ facie*, and warrants a right of entry on the land. By the terms of the ordinance admitting the State of Illinois into the Union, it was among other things stipulated, "That every and each tract of land sold by the United States, from and after the first day of January, 1819, shall remain exempt from any tax laid by order or under the authority of the State, for any purpose whatever, for the term of five years from and after the day of sale. Now at what time would this exemption begin to run? Certainly from the day of sale, and not from the time of issuing the patent. As long as the estate is in the United States, the lands are not taxable; and if the legal estate did not pass at the time of the purchase and sale, the land could not be taxed until the patent issues. The proposition that the estate remains in the United States, until the

patent issues, could never be adopted as a rule from whence to compute the time for such purpose, because of its extreme uncertainty and perpetual variableness. The sale must be considered as severing the particular tract purchased, from the mass of the public lands, "*eo instanti*," as has well been remarked, from which time the five years are to be computed, and a divestiture of the title of the United States ensues, and the purchaser's title necessarily vests thereby. The legislature, in the enactment of the law just quoted, must have so considered it, and with the view to remove all doubt, never presumed their constitutional right to pass it could be questioned. It is, however, said, that while this act is admitted to be just and politic as between individuals, it cannot be applied where the rights of the government are in issue. It is also admitted that the State had the undoubted right to pass the law, and to prescribe what should be the rules of evidence in the courts of the State; but that it cannot be obligatory on the United States, because it violates the ordinance of 1787, being an "inference with the primary disposal of the soil by the United States, and the regulations which Congress has adopted to secure the title to the *bonâ fide* purchasers." We lay it down as an incontrovertible position, that the character of a general law, and the force, effect, and application thereof, are not to be determined by the character of the parties to the action. It would be strange indeed, if such a rule could prevail; it must be of universal application, within the State which has adopted it as a rule of action, if it has been constitutionally adopted, and the courts of the States being bound to regard laws so passed, must so consider them. Unless, then, the act is void, for the reason that it conflicts with the ordinance of 1787, its binding force on all parties in the State courts is undeniable. Let the alleged conflict of the provisions of this law, with the ordinance, be now considered; and here we confess we are at a loss to conjecture in what part of the provision of the section of the law, that conflict is to be found. In what manner does it interfere with the primary disposal of the soil? Does it not adopt the mode prescribed by Congress, and declare that this mode shall be evidence of title, until a better one is shown? Has it said the lands shall not be sold? No. Has it attempted to prescribe to the government of the United States in what manner such sales shall be made? No. Has it, by indirect means or oppressive provisions, in any way whatever, embarrassed the sales made or proposed to be made? No. Has it imposed a tax on the lands, or prohibited an entry, or prevented the purchaser from occupying the same? No. In what then does this interference consist? In nothing. On the contrary it has recognized

the right of the government to the fullest possible extent, to sell and dispose of those lands; and has not only recognized, to the fullest extent, the rights of the purchaser under such sales, but has provided a means for him to acquire his possession when his right is disputed unjustly; and as a measure of preventive justice, protected him from the acts of the lawless intruder, without leaving him to the tardy and uncertain process of the production of his patent, from the notoriety of the difficulty of obtaining which, he might have to wait in years of expectation, without remedy. But we are told that it "interferes with the regulations adopted to secure the title to the *bonâ fide* purchasers." With what regulation does it interfere? Does or can it prevent the issue of the certificate or patent? Is it an interference because it is ancillary to the assertion of the rights of which the patent would be evidence, and removes the difficulty under which the party must labor until its obtention,—because it protects the party in his purchase, advances the means of proof of his legal interest and right of entry on the lands by him honestly and fairly purchased, and dispenses with the law's delays attendant on the production of the patent, and above all adds greatly to the security of the party's rights and possessions? Can it be asserted, with reason, that this beneficial and remedial law is an interference with the regulations of Congress to secure the title to the purchasers of the public domain? In vain shall language be tortured to prove satisfactorily such a result. But if it were admitted for the sake of argument to be so, it is equally so in the case decided between Bruner and Manlove. This court did not, in that case, so esteem it; nor yet in the case of Doe on the demise of Moore v. Hill, in which it adjudged the certificate of Governor St. Clair, more effectual than the patent issued by the President for the same land some years since. The judiciary committee of the United States Senate, in a report by Judge Burnet of Ohio, as chairman thereof, on the class of claims of which this thus decided formed one, expressed opinions in exact coincidence with that decision. The decision of this court in that case, and the report, were made nearly simultaneously. If the law be an interference in any case, it must be so in all. The conclusion is inevitable. It cannot be valid in one case, and invalid in another precisely similar, though the parties may differ in name and person. The incongruity and unsoundness of the assertion, seems too apparent to require further comment. It is also contended that the better legal and paramount title to the lands in question, is in the government, and that this has been shown. It may be worthy of consideration, to ask, what the framers of this law considered a better legal and paramount title? Is it rational to suppose that they conceived,

when they were providing an additional and auxiliary means of proof for the purchaser of the public domain, and by which he was either to obtain his possessions, having the right in himself, or to protect himself therein, that they contemplated the idea, that although the party had purchased and paid the government for the land, the better legal and paramount title remained in the government; and that against the assertion of such title, he should be protected. It would, in our estimation, be putting an intention into the minds of the legislators of too unjust and ungenerous a suspicion against the government, which, from the uniform character of its acts, and high sense of the principles of universal justice, would have been as derogatory to those entertaining such opinions, as it could not fail to be to those who should act on them. This view could never have entered into their conception. But as the history of the country had shown, and as the case of Doe on the demise of *Moore v. Hill*, before referred to, proves, there were many British and French grants which had been located on the public lands in this State, some of which the government had recognized, and others having been considered void, the government had sold, and intended to sell the lands thus claimed. The case of *Hill* shows a case of the kind, and is one of the class of cases intended by the description of a better legal and paramount title; for by the decision of this court in that case, it overreached the patent of the United States, and was therefore decided to be the better legal and paramount title. This case abundantly illustrates what the legislature of Illinois intended by the better legal and paramount title. This accords with the sense of the terms used, and the intentions of the framers of the act. The words, the context, the subject matter, the effects, and the consequences, and the reason, and the spirit of the law, all establish, to our minds, the interpretation we have put on it; we think it can justly admit of no other. Hence we conclude, that the application of this part of the statute to the case, as showing the title in the government, and adverse to the right of recovery, is by no means warranted. For the reasons given, there can be no paramount title in this case, because the government had parted with all they had, according to the forms of law prescribed for the mode of disposing of the public lands, and are concluded and estopped by the acts of their own officers.—Other examples are not wanting of similar provident and useful legislation of this State, in reference to title to land. By acts in force, July 1st, 1827 and 1829, it is provided that conveyances of lands shall be valid, notwithstanding the grantor is out of possession at the time of the grant, or the lands are held adversely, and that the words “grant, bargain, and

sell," shall be held an express covenant to the grantee, his heirs, and assigns, that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances from the grantor, except rents and services that may be reserved, unless limited by express words contained in such deed. We hold, in regard to municipal rights and obligations, that the government, as a moral being, must be, in contracting, subject, in the absence of a law of Congress in relation thereto, to the laws of the States, and that the same principles and rules of interpretation of contracts and acts growing out of them, as prevail between individuals, must be applicable to it. "Thus, if the United States becomes the holder of a bill of exchange, they are bound to the same diligence, as to giving notice, in order to charge an indorser upon the dishonor of the bill, as a private holder would be." With these views we arrive at the conclusion, that the third ground of objection fails. In connection with this part of the case, an argument has been started by one of the counsel for the lessor of the plaintiff, which, if entered into, would embrace a wide field of inquiry, not only interesting for the character of the question it discusses, but certainly involving a subject of grave import, affecting the rights of the western States. The question whether, if at all, or how far, the western States are bound by the ordinance of 1787, after they have become sovereign, free, and independent States; and whether the exercise of the powers appertaining to all sovereign States, connected with the principles of eminent and high domain, may not be asserted by the States, are subjects which we hope may, by a just and liberal policy on the part of the General Government toward the new States, give repose to the disturbing character which the agitation of this question is calculated to produce. The exercise of powers and jurisdiction by the new States over the public lands within their respective limits, for the purpose of intercommunication between their citizens, by the means of roads, and the political and legal organization of new counties in this State, on and over districts of country not even yet surveyed, has been so long permitted and acquiesced in, as to ripen into an acknowledged right; and we are not aware that for any other object, it would be useful to examine questions which it is sincerely hoped may remain undisturbed.

As to the last and remaining ground assumed in defence, it must be conceded that the United States could not be a defendant in a State court, in any action whatever, such court having no jurisdiction over her; and consent could not give it. And although it is certainly true that the tenant, in all actions of ejectment, may defend himself by showing the title of his landlord, it does not follow that the party who

could not be a defendant for want of jurisdiction in the court over him, may defend himself in such case in the name of a person, who, upon no reasonable supposition, could be considered as standing in the nature of a tenant. Can it be that a military officer, charged with the command of troops in the occupation of a garrison, is the tenant of a power, which not only commands his movements at will, but whose physical action, if the term be admissible, is entirely dependent on the direction of his superior, and that the relation of landlord and tenant is created by this military connection? Is not the idea repugnant to all our notions of legal rights, whether drawn from the civil, statute, or common law? And although it has been held that every person may be considered a landlord for the purpose of being admitted to defend an ejectionment, whose title is connected to, and consistent with, the possession of the occupier, can it be that the United States could so appear where jurisdiction is not given? If not, how is it that the converse of the rule is applied? and that if the officer cannot defend by showing title in another, that another may defend in the name of him who has neither title nor defence? It is, however, deemed of little importance to decide this particular question, because all those affecting the real merits of the controversy, and the rights of the parties, are considered to have been fully and particularly examined and decided. In arriving at a final conclusion in this case, it is but just to remark, that the principles upon which it turns, cannot for a moment be supposed to be in any way affected by the value of the lands in controversy, be it small or great. Satisfied of the legality and justice of the case presented by the lessor of the plaintiff, and that the granting of the preëmption to Beaubien was a matter of simple right, disconnected with the equity with which his claim would be necessarily connected, marked as it is with the continued and protracted occupation during a period of 19 years—a much greater portion of which the spot so by him occupied was in the midst of a wilderness, exposed to all the dangers and vicissitudes necessarily connected with a location so immediately surrounded by savages, and that this view of the whole case cannot be considered repugnant to the universal principles of justice, and the sense of right entertained by the government itself; it is the opinion of a majority of the court, that the judgment of the Circuit Court be reversed; and this court, proceeding to render such judgment as the Circuit Court ought to have rendered, do order and adjudge, that judgment be rendered herein for the lessor of the plaintiff, that he recover his term of years unexpired and yet to come in the premises in the declaration described, with his costs of suit in this court, and the court below;

McConnel v. Wilcox.

and that a writ of possession and execution be awarded for such purpose.

Judgment reversed.

McConnel pro se.

D. J. Baker, for defendant.

(a) This cause was heard at the last December term of this court. Lockwood, Justice, dissented from the opinion of the majority of the court; and Wilson, Chief Justice, being interested in the decision of the questions involved in the cause, gave no opinion.

(b) Since the foregoing decision, viz., Feb. 27, 1889, this statute was enacted by the Illinois Legislature. "That a patent for land shall be deemed and considered a better legal and paramount title in the patentee, his heirs or assigns, than the official certificate of any register of a land office of the United States, of the entry or purchase of the same land."

(c) This cause was taken to the Supreme Court of the U. S., and by that tribunal the judgment of the Illinois Supreme Court was reversed. *Wilcox v. McConnel*, 14 Peters R.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1837, AT VANDALIA.

WARNOCK *v.* RUSSELL.

1 Scam. R., 383.

Appeal from the Municipal Court of Alton.

1. A NON-RESIDENT, prior to the institution of a suit in our courts, must file a bond for costs.
2. Such bond must be in the form prescribed by the statute.
3. The cost-bond must be entitled in the cause.
4. A cost-bond on a paper disconnected from all prior proceedings entitled "Same *v.* Same," is insufficient.

Judgment reversed.

Linder, for appellant.

Cowles, for appellee.

MOFFETT *v.* CLEMENTS.

1 Scam. R., 384.

Appeal from Macon.

1. The "*allegata et probata*" in a chancery cause must correspond.
2. Where a bill in equity alleges that a note was paid by the complainant on a specified day, and the proof is that after the day the complainant offered to pay it—the bill cannot be sustained.
3. On a bill filed by the vendee for the specific performance of a contract to convey land, the complainant must show a performance of the contract on his part, or an excuse for his non-performance.

LOCKWOOD, J.—This was a bill in chancery filed in the Macon Circuit Court by Moffett against Clements, to obtain the specific performance of an agreement in writing, dated 29th of April, 1834, to convey a tract of land. The bill alleges that Clements was to convey the land upon the complainant's paying to the defendant a promissory note for \$100, dated April 9th, 1834, when said note became due, which

was sixty days after date. The bill further alleges that the complainant fully paid and discharged the note according to its tenor and effect. The defendant in his answer, states that no portion of the purchase money has ever been paid or tendered to him. The depositions show that in the year 1832, the complainant leased to the defendant a stock farm with stock on it for eight years; that the defendant was also to furnish some stock, and manage the whole for their joint benefit; that each should share alike in the benefit of all sales of stock. That on the 29th of March, 1836, the defendant furnished an inventory of sales of stock amounting to about \$1,200. That complainant offered to defendant, on or about the 29th of March, 1836, to credit the defendant on the account, the amount of the note executed for the purchase of the tract of land above mentioned, if defendant would convey the land, which offer the defendant refused to accept. That on the 22d of April, 1836, the defendant paid one Emerson, the attorney for complainant, the sum of \$372 24, the balance due the complainant, on the sales of stock mentioned in the inventory, and that at the time of said payment, said Emerson offered to said defendant, that he might retain the money due on the note, provided the defendant would give up the note, which offer the defendant refused to accept, and paid the whole money to Emerson. The depositions also show that the defendant once called on complainant to pay the note, and once sent to him for the money. The case was decided in the Circuit Court on the bill, answer, replication, and depositions. The court below was of opinion that the complainant had failed to pay the defendant the sum of \$100, the purchase money for the land as specified in the written agreement, according to the tenor and effect thereof, and therefore decreed that the bill be dismissed. To reverse this decree, an appeal has been taken to this court. The only error assigned is, the general error that the decree ought to have been in favor of the complainant, and not in favor of the defendant. It was urged on the argument, on behalf of the complainant, that time in general is not of the essence of a contract to convey land, so as to prevent a specific execution of the contract. Without, however, deciding how far the time of payment, in this case, was of the essence of the contract, it is sufficient for this court to say, that the bill stating that payment was made on the day the money became due, is not sustained by proving that the money was paid, or offered to be paid, at a subsequent and remote day.

In this case, however, the answer wholly denies the payment of the note, and the depositions only show an offer to credit the defendant for the money nearly two years after the note became due. This offer

Moffett v. Clements.

Beaubien v. Barbour.

does not sustain the allegations in the bill. The rule at law, that the evidence must substantially support the plaintiff's declaration, is applicable to bills in chancery. As the proof wholly fails to show any payment of the note, the decision of the Circuit Court was correct. Whether the complainant may not present such a case by a proper bill, as to authorize a decree for specific performance, is a question this court is not called on to decide.

Decree affirmed.

A. Williams, W. Thomas and W. Brown, for appellant.

Fisk, for appellee.



BEAUBIEN v. BARBOUR.

1 Scam. R., 386.

Appeal from Cook.

1. Error in fact cannot ordinarily be assigned in the Supreme Court.
2. Where a writ is improperly tested the remedy of the injured party is by motion or plea in abatement in the Court from whence the process emanated.
3. Dilatory motions and pleas must be made in the first instance, and cannot be made in the appellate court.
4. An irregular test of a writ is legalized by the act of July, 1837.

THIS is an action commenced in the Cook Circuit Court, by John M. Barbour against Mark Beaubien. The summons was dated on the 23d day of March, 1837, and tested in the name of Thomas Ford, as judge of said court. The summons was duly executed and returned. At the May term of said court, 1837, Beaubien failing to appear, judgment was rendered against him by default, for \$764 15 damages and costs of suit. From this judgment Beaubien appealed to this court.

SMITH, J.—In this case it is assigned for error that the process was not tested in the name of a circuit judge of this State, nor of any clerk of any Circuit Court. On inspection of the process, it appears to be tested in the name of Thomas Ford, judge of the Circuit Court of Cook county. This court must presume this test to be true, until the contrary appears. If the individual was not judge of that court, at the time of the emanation of the writ, this would be a fact to have been shown by evidence. The misconception of counsel, in assigning here an error in fact, for a supposed error in law, is not only irregular, but unavailing. If there had been an erroneous test, the defendant might, by motion in the court below, have availed himself of the objection; but the record, we apprehend, cannot now be contradicted. Besides, the acts of the last session of the legislature have provided for

Beaubien v. Barbour. Lyon v. Barney. Peyton v. Tappan. Longley v. Norvall.

the cases of the irregular tests of writs of the kind here supposed, and legalized them.

Judgment affirmed.

Spring, for appellant.

Scammon, for appellee.

LYON v. BARNEY.

1 Scam. R., 387.

Error to McLean.

1. WHERE the record shows that the plea of the defendant was filed, and the judgment by default, in behalf of the plaintiff, was rendered on the same day, the Supreme Court will not presume that the plea was filed after the default, but will reverse the judgment.

2. A judgment in assumpsit cannot be for "DEBT *and damages*."

Judgment reversed.

Davis and *Forman*, for plaintiff.

Ford, for defendant.

PEYTON v. TAPPAN.

1 Scam. R., 388.

Appeal from the Municipal Court of Chicago.

WHERE the declaration averred that the defendants made their promissory note to the plaintiff, Alexander Tappan, and the note produced in evidence was made payable to A. H. Tappan, and the plaintiff proved by parol that Alexander and A. H. was one and the same person, and the holder of the note: *Held* that the proof sustained the declaration.

Judgment affirmed.

Grant, for appellant.

Scammon, for appellee.

LONGLEY v. NORVALL.

1 Scam. R., 389.

Appeal from Schuyler.

1. There is technically no plea of the general issue in an action of covenant.

2. A plea of *non est factum* in covenant is a good plea, though not verified by affidavit under the statute. It does not put in issue the execution of the instrument sued on, but every other defence is admissible under the plea as at common law.

LOCKWOOD, J.—Norvall commenced an action of *covenant* in the

Longley v. Norvall.

Schuyler Circuit Court, against William and Edwin Longley, on a sealed note. The defendants pleaded *non est factum*, without accompanying the plea with an affidavit of its truth. To this plea the plaintiff demurred, and the court sustained the demurrer.

By the 12th section of the "*Act concerning Practice in Courts of Law*," it is enacted, "That the defendant may plead as many matters of fact in several pleas, as he may deem necessary for his defence, or may plead the *general issue*, and give notice under the same of the special matters intended to be relied on, for his defence, on the trial, under which notice, if adjudged by the court to be sufficiently clear and explicit, the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon; but no persons shall be permitted to deny on trial, the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, unless the person so denying the same, shall, if defendant, verify his plea by affidavit."

It was contended on the argument, that the plea filed in this case, was bad, because it was not verified by affidavit. This is not the true construction of the act. In an action of covenant, there is strictly no plea which can be termed a general issue; but the plea of *non est factum*, the general issue in debt on specialty, is correctly used, to answer in this action the same end it does in debt. At common law, when such a plea was interposed and issue joined thereon, the plaintiff was under the necessity of proving the execution of the sealed instrument declared on by the subscribing witness, if there was one, and the handwriting of the defendant, if there was no subscribing witness. This rule of evidence was considered by the legislature as imposing an unreasonable burden upon the plaintiff, and hence the passage of this act to dispense with proof of the execution of written instruments, unless the defendant denied their execution on oath. The legislature did not intend to change the rules of pleading, as respects this plea; but to dispense with a rule of evidence that was oppressive. If a party when he files his plea, does not verify it by affidavit, he may, notwithstanding this omission, rely on any legal defence under his plea, that he could have done at common law, except merely denying or disproving the execution of the writing declared on. The Circuit Court consequently erred in sustaining the plaintiff's demurrer.

Judgment reversed.

Logan and Baker, for appellants.

Maxwell, for appellee.

Manlove v. Bruner.

Covell v. Marks.

Highland v. The People.

MANLOVE v. BRUNER.

1 Scam. R., 390.

Appeal from Schuyler.

It is error to render a judgment by default in the action of *ejectment*, where a plea has been filed by the defendants; the proper course is to call a jury and try the cause *ex parte*. (a)

*Judgment reversed.**McConnel*, for appellee.

(a) Covell v. Marks, 1 Scam. R., 391.

COVELL v. MARKS.

1 Scam. R., 391.

Error to McLean.

WHEN a plea of the general issue has been filed in *assumpsit* a default is irregular, a jury should be called and the cause tried *ex parte*.

*Judgment reversed.**Davis* and *Forman*, for plaintiffs.*Ford*, for defendant.

HIGHLAND v. THE PEOPLE.

1 Scam. R., 392.

Error to Cook.

1. A verdict in *larceny* should find the value of the property stolen.
2. There are no intendments ordinarily in criminal causes.

SMITH, J.—The prisoner was indicted, tried, and convicted of larceny, at the last May term of the Cook Circuit Court. The indictment contains two counts, and charges the plaintiff in error with stealing various articles of personal property, of different amounts in value, from twelve and a half cents to twenty-five dollars. The jury who tried the prisoner, returned a general verdict in these words: "We, the jury, find the defendant guilty, and sentence him to the penitentiary for the term of three years." On this verdict the Circuit Court rendered judgment, and sentenced the prisoner to three years imprisonment in the penitentiary at hard labor, except that for one month of this time he was to suffer solitary confinement. During the progress of the cause, the counsel for the prisoner moved to

quash the indictment, on several grounds, which, however, are not now considered important to be reviewed in the decision of this case, because the motion to arrest the judgment ought to have prevailed for the reasons specified in the third ground assigned in the court below, and now here reassigned for error.

That cause is the insufficiency of the verdict in not finding the value of the property charged to have been stolen.

By the 63d section of the "Act relative to Criminal Jurisprudence," it is declared that "No person convicted of larceny, shall be condemned to the penitentiary, unless the money or the value of the thing stolen, shall amount to five dollars;" and by the 158th section of the same act, it is declared that "The jury who try the case shall designate in their verdict, the term of time the offender shall be confined; and the court shall pronounce the sentence, designating the extent of solitary confinement, and of hard labor in the penitentiary." From the provision of the 63d section, it became the duty of the jury to designate in their verdict the value of the property stolen by the prisoner, as otherwise, without that finding, it was impossible for the court to legally determine whether the prisoner was a subject of penitentiary punishment. The value of the articles charged to have been stolen, may or may not have been the value alleged, and the proof may not have shown that all were stolen; and as some were of small and others of greater value, the jury might have been satisfied of the guilt of the prisoner, on the proof of any one having been stolen. The guilt might have been confined to one of less value than five dollars, and if so, the sentence could not stand.

The jury in appointing the time, should, also, show enough on the face of their verdict, that they acted, in giving their sentence, within the provisions of the 63d section of the act. This ought to appear affirmatively, and not require inference or implication to sustain it. Nothing can be taken by implication in a criminal case. The clear and absolute ascertainment of facts should alone warrant the character of the punishment pronounced by a court of justice. No possible doubt should be entertained whether the verdict of the jury warranted the judgment to be given. Where inference and intendment are to be resorted to, to supply the defect in the verdict, as to the value, as in the present case, doubts cannot but arise as to the correctness of such inference and intendment of the law.

It is one of the boasted principles by which the character of our criminal jurisprudence is said to be marked, that in all cases of doubt the criminal shall be entitled to the benefit thereof; and it is not more wise than it is humane. We cannot in this decision have the advan-

Highland v. The People.

Anglin v. Nott.

Roberts v. Garen.

tage of precedents, because of the peculiar feature of our code in criminal cases, giving to the jury the power of awarding the time of punishment; but the practice that prevailed in England and in some of the United States, while the distinction existed between grand and petit larceny, the punishment of which differed essentially, is considered analogous. The jury in their finding always designated whether they found the prisoner guilty of grand or petit larceny; and this depended on the value of the articles stolen. For the reasons assigned, we are of opinion that it was an indispensable requisite of the verdict in this case, to authorize the judgment pronounced, that it should have contained the value of the property of which the jury found the prisoner guilty of stealing; and as that does not appear, the Circuit Court erred in not arresting the judgment.

*Judgment reversed.**Caton and Judd*, for plaintiff.*Linder*, attorney-general, for defendants.

ANGLIN v. NOTT.

1 Scam. R., 395.

Appeal from Clark.

A SUMMONS issuing out of the Circuit Court without a seal, will be quashed on motion. (a)

*Judgment reversed.**Ficklin*, for appellant.*Cooper*, for appellee.

(a) *Morrison v. Silverburgh*, 18 Ill. R., 553. *Dunlap v. Eames*, 8 Gilm. R., 286. *Williams v. Blankenship*, 12 Ill. R., 122.

ROBERTS v. GAREN.

1 Scam. R., 396.

Appeal from Wayne.

1. A promise to pay for improvements made upon public land, by the purchaser from the United States after his entry, is without consideration and void.
2. A witness when sworn in a cause is bound to tell "the truth, the whole truth, and nothing but the truth."
3. It is perfectly immaterial whether the cause alleged in a declaration is proven by the witnesses for the plaintiff or the defendant, and whether the facts which authorize a recovery or defence is established upon the examination in chief, or upon a cross-examination.

WILSON, C. J.—This action was brought upon a promise to pay for an improvement upon Congress land. Upon the trial of the cause, the de-

defendant's counsel moved the court to instruct the jury, "That if it appeared from the evidence adduced by the plaintiff, that the defendant had entered the land before the promise to pay for said improvement was proved to have been made, that then they must find for the defendant." This instruction the court refused, but instructed the jury that if such evidence was given by any witness without being called for by the plaintiff, they must not regard it, otherwise they should.

The refusal of the court to give the instructions asked for, and also the giving the instructions which it did give, are assigned for error by the defendant. The principle is uncontroverted, that a promise that is not founded upon either a legal or moral obligation, is not binding in law; and in the case of *Carson v. Clark* this court decided, that a promise made by a purchaser of government land, to pay for improvements upon such land, was a promise within this rule, and therefore void, where the promise was made after the promisor had acquired title to the land and improvements by purchase from the government. It was incumbent, then, upon the plaintiff in this case, to have proved not only the promise of the defendant, but that the improvements, which were the consideration of the promise, were at the time the contract was entered into, upon the land of the government, and not upon the land of the defendant. If he had failed in making out either of these points, he was not entitled to recover; and any testimony which showed the promise of the defendant to have been subsequent to his purchase of the land upon which the improvements were made, was entitled to equal weight, whether adduced by the plaintiff or defendant. If the plaintiff's own testimony show a state of facts which defeats his title to recover, the defendant is entitled to the benefit of it, and is under no obligation to adduce testimony by way of confirmation, and to make assurance doubly sure. The court erred therefore in refusing the instructions asked for, and also in the instructions which it gave. The distinction drawn by the court in this instruction with respect to the different degrees of credit which the jury should give to those statements of the plaintiff's witnesses which were drawn from them by his interrogatories or examination, and such as were voluntarily made, or made upon the cross examination of the defendant, is without any foundation. The circumstance of a witness' being called to support the plaintiff's cause, does not render illegal, or discredit, such portions of his testimony as may make against his cause, whether the facts were brought out by the plaintiff's examination or otherwise. When a witness is sworn in chief, he is bound to state all the facts in his knowledge,

Roberts v. Garen.

Bell v. The People.

Willis v. The People.

Key v. Collins.

that are applicable to the case, and may legally be proved by parol, and neither the court, nor the party calling him, can separate his testimony, and take such part as they may like, and reject the balance.

Judgment reversed.

Ficklin, for appellant.

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BELL v. THE PEOPLE.

1 Scam. R., 397.

Error to Municipal Court of Chicago.

1. THE Municipal Court of Chicago has no jurisdiction beyond the territorial limits of the city in criminal prosecutions.

2. An indictment is bad which does not show upon its face, that it was found by grand jurors who had authority to examine and indict.

Judgment reversed.

Grant, for plaintiff.

Linder, attorney-general, for defendants.

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WILLIS v. THE PEOPLE.

1 Scam. R., 399.

Error to Gallatin.

1. CERTAINTY in criminal proceedings is essential to their legality.

2. An indictment must set forth the christian and surnames of the injured parties in full.

3. Where a party, upon affidavit, applies for a continuance, the adverse party may admit the facts, and insist upon a trial; but every fact stated in the affidavit must be taken as true.

Judgment reversed.

Eddy, for plaintiff.

Linder, attorney-general, for defendants.

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KEY v. COLLINS.

1 Scam. R., 403.

Error to Morgan.

1. ORIGINAL process can be issued to a different county from that in which the action is commenced, in the three following cases only:

Key v. Collins.

Guild v. Johnson.

Davis v. Hoxey.

(1.) When the plaintiff resides in the county in which the action is commenced, and the cause of action accrued in such county.

(2.) Where the contract is made specifically payable in the county in which the action is brought. In this case, no regard is paid to the residence of the plaintiff.

(3.) Where there are several defendants residing in different counties and the action is commenced in the county in which some one of the defendants reside.

2. Where process is issued to a foreign county, the declaration should contain an averment of the facts necessary to authorize the emanation of the writ to such foreign county. An averment that the cause of action accrued in the county where the suit was brought, without averring that the plaintiff resided there at the time of the commencement of the suit, would not be sufficient.

3. An affidavit of the facts which give the court jurisdiction, is not necessary to authorize the issuing of process to a foreign county; and if it is made, it does not thereby become a part of the record, or dispense with the averment of those facts in the declaration.

Judgment reversed. (a)

Lamborn, Davis and Forman, for plaintiff.

McConnel, for defendant.

(a) Kenney v. Greer, 13 Ill. R., 482; which overrules all prior cases.

GUILD v. JOHNSON

1 Scam. R., 405.

Appeal from the Municipal Court of Chicago.

1. WHERE the form of action is in debt, a judgment for damages only is erroneous.

2. But the Supreme Court will enter the proper judgment, if the record furnishes the basis of the modification.

Judgment reversed, but modified.

Scammon, for appellant.

Spring, for appellee.

DAVIS v. HOXEY.

1 Scam. R., 406.

Error to Macoupin.

WHERE the evidence tends to prove the issue joined between the

Davis v. Hoxey.

Atkinson v. Lester.

parties, the Circuit Court has no right to order a nonsuit, or instruct the jury to find for the defendant. (a)

Judgment reversed.

Cowles and Fisk, for plaintiff.

Logan and Baker, for defendant.

(a). *Amos v. Sinnott*, 4 Scam. R., 440; *People v. Browne*, 8 Gilm. R., 88.

ATKINSON v. LESTER.

1 Scam. R., 407.

Appeal from Cook.

1. To constitute a forcible entry and detainer under the statute of this State, it is not necessary that actual force and physical violence should be used.
2. The statute in relation to forcible entry and detainer provides for three cases :
 1. A wrongful or illegal entry, as contradistinguished from a forcible and violent one.
 2. A forcible entry committed with actual force and violence.
 3. A wrongful holding over by a tenant.
3. In an action for forcible entry and detainer, the description of the premises in the affidavit was as follows : "The premises inclosed by us, situate in the county of Cook, and State of Illinois, being the same on which you now reside, containing about one hundred acres, more or less, and commonly called North Grove:" Held that the description was sufficient.
4. A court is not bound to instruct the jury upon mere abstract propositions of law, which do not refer in any way to the evidence in the case.

SMITH, J.—This was an action of *forcible entry and detainer*, prosecuted before two justices of the peace, and removed by appeal to the Circuit Court of Cook county, and by appeal from that court to this. The following points are made and relied on as grounds of error by the appellant :

1. That the affidavit and notice do not contain a sufficient description of the premises.

2. That the Circuit Court, in refusing to instruct the jury "that a mere trespass, without other act of force and violence, is not such force and violence as will constitute a forcible entry and detainer; and that to constitute a forcible entry, the party must enter with strong hand or force and violence;" and also, in instructing the jury, "that, if they should believe, from the evidence, that the defendant entered wrongfully and without lawful right, and then kept the plaintiffs out from regaining possession, it is sufficient to sustain this action; and it is not necessary to prove actual force and physical violence to sustain this action."

The description in the affidavit and notice is, "of the premises inclosed by us, situate in the county of Cook, and State of Illinois, being the same on which you now reside, containing about one hun-

*Atkinson v. Lester.**Butts v. Huntley.*

dred acres of land, more or less, and commonly called North Grove." This description, although general, is sufficiently certain for the purposes of this action.

In considering the second point, it may be remarked, that the instructions asked are mere abstract propositions of law, and do not in any way refer to the evidence in the cause, though they may be referrible to a case of forcible entry and detainer, and might have been, as mere abstract questions, refused to be given by the court; but they were properly refused, and the instructions given were correct.

The act of the legislature of this State in regard to forcible entry and detainer, is peculiar in its phraseology, and evidently provides a remedy for three classes of cases under the law.

The first section declares, that "If any person shall make entry into lands, tenements, or other possessions, except where entry is given by law, or shall make any such entry by force; or if any person shall willfully, and without force, hold over any lands, tenements, or other possessions, after the determination of the time for which such lands, tenements, or possessions were let to him, or to the person under whom he claims, after demand made in writing for possession thereof, by the person entitled to such possession, such person shall be adjudged guilty of a forcible entry and detainer, or of a forcible detainer, as the case may be, within the intent and meaning of this act."

From this section it will be perceived that there is: First, a wrongful or illegal entry, as contradistinguished from a forcible or violent one; secondly, a forcible one by means of actual violence; and, thirdly, that of a wrongful holding over of a tenant.

This case may then be arranged to the first class contemplated by the statute; and the instructions of the court were directly applicable to it, and properly given.

Judgment affirmed.

Grant, for appellant.

Ford, for appellee.



BUTTS *v.* HUNTLEY.

1 Scam. R., 410.

Appeal from Adams.

1. WHERE A contracts to build a mill for B, and partially performs, and is prevented from completing the job by the act of B, he may recover upon a *quantum meruit* for his services.

Butts v. Huntley. Lawrence v. The People. Pearsons v. Hamilton. Stacy v. Baker.

2. A justice of the peace has jurisdiction in such a case if the amount does not exceed \$100.

Judgment affirmed.

Browning and Ford, for appellant.

A. Williams, Davis and Forman, for appellee.



LAWRENCE v. THE PEOPLE.

1 Scam. R., 414.

Error to Cook.

WHERE a verdict in a criminal case is so defective that no judgment can be pronounced thereon, the Circuit Court may treat it as a nullity and upon its own mere motion award *avenire de novo*.

Judgment affirmed.

Stuart, for plaintiff.

Grant, State attorney, for defendants.



PEARSONS v. HAMILTON.

1 Scam. R., 415.

Appeal from Cook.

1. A JUDGMENT merges and extinguishes the contract upon which it is based.

2. Interest cannot be computed according to the contract, after the rendition of a judgment thereon.

3. A judgment must be for a specific sum, it must be absolute in its terms, and cannot provide for any contingency whatever.

4. Where the Supreme Court can render such a judgment as the inferior court ought to have given, the cause will not be remanded, but the proper judgment will be entered by the appellate court.

Judgment modified.

Ford, for appellant.

Scammon, for appellee.



STACY v. BAKER.

1 Scam. R., 417.

Appeal from Morgan.

1. WHERE the plaintiff demurs generally to several pleas and one of the pleas constitutes a bar, the demurrer will be overruled.

2. The *lex loci contractus* controls as to the validity and construction of the contract.

Stacy v. Baker. Campbell v. State Bank of Illinois. Lafayette Bank of Cincinnati v. Stone.

3. The law in force at the time of the making of a contract, enters into and forms a part of the agreement, as much as if the law was recited in the body of the written agreement.

4. An assignor of a promissory note is not a competent witness to prove *when* the assignment was made.

Judgment reversed.

Walker and Brown, for appellant.

W. Thomas, for appellee.



CAMPBELL v. STATE BANK OF ILLINOIS.

1 Scam. R., 423.

Error to Fayette.

WHERE a *supersedeas* bond is executed by a stranger, in the capacity of an attorney in fact for the principal, and the bond is executed in the name of the principal and the bond purports upon its face to be signed by the stranger as the attorney in fact of the principal; the Supreme Court will presume the authority, in the absence of an affidavit, impeaching the power.

Motion to dismiss overruled.



LAFAYETTE BANK OF CINCINNATI v. STONE.

1 Scam. R., 424.

Error to Municipal Court of Alton.

1. Where a sister State by legislation incorporates a banking institution, and it becomes necessary to use the act of incorporation in our courts, the mode of authenticating the act is for the secretary of the sister State, or other keeper of the records, to certify that the transcript is a perfect copy of the original, and authenticate it by the seal of State, and then the governor must certify to the official character of the secretary.
2. Where the Secretary of State omits to affix the seal of State to his certificate, the transcript is not duly certified.
3. The attachment of the great seal to the Governor's certificate will not aid the omission.

THIS was an action of assumpsit by the indorsee against the maker of a bill of exchange. The defendant by plea in abatement denied the corporate existence of the indorsees and plaintiffs, upon which plea an issue was formed. To establish the fact that the plaintiff was a corporation under the Constitution and laws of Ohio, the act of incorporation was introduced in evidence with the following certificates attached thereto, viz.:

Lafayette Bank of Cincinnati v. Stone.

"SECRETARY OF STATE'S OFFICE, COLUMBUS,
OHIO, *March* 18, 1834.

"I do hereby certify that the foregoing act is a correct copy of the original roll thereof, remaining on file in this office.

"B. HINKSON, Secretary of State."

"UNITED STATES OF AMERICA,
THE STATE OF OHIO, EXECUTIVE OFFICE.

"I, Robert Lucas, Governor and Commander in Chief of the State of Ohio, do hereby certify that B. Hinkson, by whom the act hereto attached appears to have been certified, now is, and was at the date of said certificate, the acting Secretary of State, in and for the said State of Ohio, having been duly elected and duly commissioned as such; and that his official acts are entitled to full faith and credit as well in courts of justice as thereout.

"In testimony whereof, I have hereunto subscribed my name, and caused the great seal of the State of Ohio to be affixed, at Columbus, this nineteenth day of *March*, in the year of our Lord one thousand eight hundred and thirty-four.

"ROBERT LUCAS."

(Great Seal
of State.)

These certificates were objected to upon the ground that the certificate required by the act of Congress was not authenticated by the great seal of State. The Circuit Court sustained the objection. The plaintiffs prosecuted a writ of error.

SMITH, J.—In considering the correctness of this decision, it is proper to look at the act of Congress directing in what manner the acts of the legislature of the several States shall be authenticated. This act has declared that these acts shall be authenticated by having the seal of their respective States affixed thereto. The paper offered in evidence is not so authenticated. The seal of the State, it appears by this certificate of the governor, is affixed for the purpose only of adding verity to the fact declared in his certificate, that B. Hinkson is Secretary of the State of Ohio, and that full faith and credit are due to his official acts; not that the facts declared in the secretary's certificate are true. This is not a compliance with the provisions of the act of Congress, which manifestly intended that the seal should be affixed, for the purpose of authenticating the act, and that the transcript thereof was an exact copy of the law passed by the State legislature. However much it may be regretted that objections, technical in their nature, are to prevail in cases like the present, the

Lafayette Bank of Cincinnati v. Stone.

Sloo v. State Bank of Illinois.

court cannot depart from the plain and obvious provisions of the law. It has no discretion to dispense with the forms prescribed; and parties who offer testimony, the manner of authenticating which is thus provided, must conform to the mandates of the law. The court below properly rejected the paper offered.

Judgment affirmed. (a)

Cowles, for plaintiff.

Linder, for defendant.

(a) A petition for a rehearing was filed, heard, and overruled.

The Constitution of the United States provides that, "Full faith and credit shall be given in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The act of Congress to carry this clause of the Constitution into effect, declares that, "*The acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto.* The records and judicial proceedings of the courts of any State, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And such records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are, or shall be taken."



SLOO v. STATE BANK OF ILLINOIS.

1 Scam. R., 428.

Error to St. Clair.

1. The transcript of the record of the Circuit Court transmitted to the Supreme Court in pursuance of an appeal or writ of error should be chronologically arranged.
2. A writ of error lies upon a motion to set aside a judgment and quash the execution issued thereon.
3. One partner cannot bind the firm by the confession of a judgment for a partnership debt. (a).

THE facts sufficiently appear in the opinion of the court delivered by

SMITH, J.—This is a writ of error, prosecuted on the part of Sloo, to reverse the judgment entered in this cause against him, on the following statement of facts appearing on the record:

A judgment, by confession, was entered in the St. Clair Circuit Court, in favor of the defendants in error, against Sloo and McClintoc, trading under the firm of Sloo & Co., for \$125,000.

This confession is made by Alfred Cowles, an attorney of that court, under a warrant of attorney, executed by McClintoc alone; in the name of the firm, without seal, authorizing any attorney, of any court in this State to appear for the partners and confess the judgment. It further appears that the residence and place of business of the plaintiffs in error, was at Alton, in the county of Madison, where the warrant of attorney was executed. No bond or evidence of pre-

vious indebtedness was filed or exhibited to the court with the power of attorney on which the judgment was confessed, but the bare authority only to confess the judgment for the sum specified, appears to have been filed when the confession was entered.

At the term immediately subsequent to the rendition of this judgment, Sloo appeared, and upon affidavits filed, moved the Circuit Court to set aside the judgment, or restrain the levying of the execution upon his property, because he never executed the power, nor authorized McClintoc to execute it for him.

The Circuit Court denied the motion, to which the plaintiff in error excepted and filed his bill of exceptions.

The plaintiff in error, Sloo, assigns for error the refusal of the Circuit Court to grant his application, and to set aside the said judgment as to him, or to restrain the execution of the judgment as to him, and also makes a general assignment of errors, to which the defendants have joined.

A preliminary question has been raised by the counsel for the bank, which it is necessary to dispose of, as, on that disposition, the further action of this court will depend.

It is contended that the assignment of errors in this case, is an assignment of errors in fact, not cognizable in this court.

The transcript returned upon the writ of error, commences with the application, notice of motion, and reasons for moving to set aside the judgment as to the applicant, and then recites that judgment, together with the warrant of attorney, the proof of its execution and the declaration and confession; after which follow the affidavits of the several parties, and the refusal of the court to grant the motion; all this is contained in the bill of exceptions, signed by the circuit judge; after which is a *remittitur*, entered on the next day after the decision on the motion, by the plaintiffs' attorney, for \$14,222 61.

That the record is inartificially drawn up, may be readily conceded. The record should have presented the proceedings in the order of time in which they transpired, commencing with those on the rendition of the judgment. Then the subsequent application and proceedings had thereon, should have followed; but because this clerical error has transpired, it will not, we conceive, make the assignment of errors an assignment of errors in fact. We apprehend the counsel has been misled in this particular, and considered the question in a different aspect from that in which the proceedings appear. But are we to sacrifice substance to mere form? And is the inverted order of time in which the proceedings are presented here, to be a sufficient reason for refusing that justice which the very right of the case, as

Sloo v. State Bank of Illinois.

presented by the record, shall demand, and turn the party round to sue out a writ of error *coram vobis*, which has been disused and superseded by the more summary mode of a direct application to the court for the rightful exercise of its own powers, over its proceedings and those of its officers?

We think the exception not well taken. The question presented in the court below, was whether a judgment, unauthorized and illegal, had been rendered as to Sloo? That depended on the authority of McClintoc to authorize the confession in favor of the bank, in the name of Sloo. The affidavit establishing the due execution of the power by McClintoc, filed with the declaration, and on which proof the judgment was ordered to be entered, shows that McClintoc, as the partner, without the consent or authority of Sloo, executed the power in question; and consequently the legal point to be determined is, whether such a power so executed, will authorize the rendition of the judgment against the other partner, who neither authorized nor assented to the confession. Apart, then, from the affidavits on which Sloo based his application for setting aside the judgment as to him, the Circuit Court had, in the original proceedings, evidence entirely sufficient, on which to determine the irregularity of the proceedings and of the erroneous character of the judgment rendered, without recurring to evidence *aliunde* the record. It is true, the special errors assigned in this court, go to the refusal to grant the motion, and do not specify this particular ground in the original record. Still we conceive we are bound to consider the whole proceedings as fairly before the court, without regarding the manner in which the clerk has made them up, and that this portion of the record, as well as that relating to the facts stated in the affidavits by both parties, was equally before the Circuit Court, as it most clearly is here.

The defendants in error, having joined in error, might also be considered as waiving all objection, if the rigid rules of pleading were insisted on, the joinder being only considered as a demurrer to the assignment of errors in cases where the errors are not well assigned, and contradict the record. It is strenuously insisted, that this court cannot decide this case without determining questions of fact without the record, in judging whether the Circuit Court erred in refusing to set aside the judgment on the application made, and that it has no jurisdiction for such purpose.

It is a sufficient answer to this objection to quote the jurisdiction expressly conferred by statute: "To determine all matters of appeal, error, or complaint from the judgment or decree, of any of the circuit courts of this State, and from such other inferior courts as may here-

after be established by law, in all matters of law and equity, wherein the rules of law or principles of equity, appear, from the files, records, or exhibits of any such court, to have been erroneously adjudged and determined."

It is then the judgment of the law on the facts, as they appear on the record, which is to be investigated to ascertain whether it has been correctly pronounced, as it shall appear to have been decided in the proceedings brought up, and not a new investigation of facts *dehors* the record. The expressions used in the statute defining the jurisdiction of this court, we agree, are not to be extended to give this court cognizance of cases in proceedings or judgments merely interlocutory; but we aver that whenever a decision takes place in any of the circuit or inferior courts of record of this State, which is final, and of which a record can be made, and which shall decide the right of property or personal liberty, complete jurisdiction is conferred on this court to hear and determine the same. Coke, in his Commentaries on Littleton, saith, that "A writ of error lieth when a man is grieved by an error in the foundation, proceedings, judgment, or execution in a cause;" and can it be said there is no grievance in the rendering a judgment against one who is not summoned to appear in court, and who has not authorized the judgment, nor been, by his consent, a party to it? This court having a revisionary power over all errors happening in the Circuit Court where the cause was prosecuted, and that court having entertained jurisdiction of the cause, and of the particular point presented, it cannot now be objected here, that this court has no power to revise those proceedings. It seems to us, that, if the reasoning of the defendants' counsel was correct, the adoption of his doctrine would lead to an almost entire subversion of the objects for which this tribunal was created. There is nothing, then, in the present case, to distinguish it from an ordinary case of a writ of error, and as such we proceed to the merits of the grounds assigned for error.

That the Circuit Court should have vacated the judgment as to Sloo, we cannot entertain a doubt; for, as has been before remarked, the affidavit of the witness to the execution of the power of attorney, under which the judgment was confessed and entered up, expressly declares that the power was signed by McClintoc for the firm of A. G. Sloo & Co., and it does not appear that McClintoc had the least authority whatever for doing the act.

Without then recurring, for the present, to the affidavits and proofs exhibited on the motion, the simple question is presented, whether one partner can confess a judgment in the name of his co-partner.

It is undeniable, that unless there be an express authority to the partner from the other, or he assent to it, the power of attorney executed by one partner in the name of the other, as to him, is void. The whole current of British and American authorities sustains this rule. Indeed we have not seen, nor do we know of a single case to the contrary.

In general, the power of attorney to confess the judgment, is accompanied by a bond, as evidence of the indebtedness or amount due.

How or when this peculiar security for a debt authorizing a creditor to sign a judgment and issue execution without even issuing a writ, was first invented, does not appear. Chitty, in commenting on it, says, "It has now become one of the most usual collateral securities on loans of money, or contracts to pay an annuity, and for debts due, but is usually accompanied with some other deed or security." It is also under seal. In the present case, the power has no seal, and it has therefore been supposed to place the case on a different footing from the adjudged cases, most of which assign, as a reason why one partner cannot confess a judgment in the name of the other, that he cannot bind the co-partnership by an act under seal. The ancient reason, in the earliest cases in which the question arose, was, that the seal of the other partner was his private property, and could not be subject to the control or use of the other. Another given is, that it is an act not within the limits of co-partnership business.

In the case of *Harrison v. Jackson*, *Sykes*, and *Rushforth*, the agreement related to a partnership transaction, was under seal and executed by *Sykes*, the other partners not being present. In an action of covenant against the three partners, on this agreement, Lord Kenyon, who gave the opinion of the court, said he admitted the authority of the partners according to the law merchant, or mercantile transactions, but denied that any power existed to bind each other by seal, unless a particular power be given for that purpose; and furthermore remarked, that it would be a most alarming doctrine to the mercantile world, if one partner could bind the others by such a deed as the one in question. It would extend to cases of mortgages, and would enable a partner to give a favorite creditor a real lien on the estates of the other partners. In the case of *Ball v. Demsterville*, *Clement v. Brush*, *Murphy v. Bloodgood*, *Green v. Beal*, *Motteux v. St. Aubin*, *Ton v. Goodrich*, the same principle was recognized. In *Pearson v. Hooker*, it was decided that one partner may release a debt due the partnership by a deed under seal.

Kent, Chief Justice, however, distinguishes this particular case from the class of cases referred to, "because there was no attempt to charge

the partnership with a debt by means of a specialty, but it is the ordinary release of a partnership debt. Each partner is competent to sell the effects, or to compound, or discharge the partnership demands; each having an entire control over the personal estate."

The Supreme Court of New York, in the case of *M'Bride v. Hogan*, after an elaborate examination of all the cases bearing on this question came to the conclusion, "That one partner cannot do any act under seal, to affect the interest of his co-partner, unless it is to release a debt." It follows, then, according to the recognized doctrine of these adjudicated cases, that this power of attorney, had it been under seal, would have been a case identical with those cited.

We may be permitted to ask, what difference there can possibly be in principle, and effect of the act done, in the cases cited, and the one under consideration. Whether the power to confess the judgment be under seal or not; can surely make no difference in its consequences or intended objects. If the power is valid, not being under seal, the consequences and results of the act are precisely similar to those which the principles of the decisions cited most strongly urge as unjust and illegal; and if void for want of a seal, the case is only thereby rendered more clear and certain.

To judge of the power of the partner, and the legality of his act, we are necessarily required to examine the consequences and effect of his act. And what are they? To subject all the private as well as joint property of the partner, both real and personal, to execution and sale; a still further consequence, his person to imprisonment, in execution of the judgment so confessed, without his authority or assent, express or implied—nay, against his most solemn protestations, or possibly obtained through misapprehensions, or fear, or through deceitful representations held out to a weak and indecisive mind; or it might happen by collusion, and for the purpose of fraud. When such results may be readily conceived—nay, be like to happen, can it indeed make any real difference whether the act, from which such consequences might flow, is or is not under seal? What magic is there in a scrawl, for that is, by our law, in effect, a seal? Can the legality, reason, or justice of the case, depend on a legal subtlety, or shall the case be decided on the broad and firm basis of reason and right?

We cast aside the distinction as unworthy the consideration of the tribunals of the present age, and unhesitatingly decide, that justice and right ought not in any case to be sacrificed to mere forms, however ancient they may be, or however numerous may have been the precedents produced. We do not, however, wish to be understood as discarding those which are essential to the correct and regular order

Sloo v. State Bank of Illinois.

of proceedings, and which are necessary to be observed in the proper and systematic conducting of cases.

We have thus far considered the case without reference to the affidavits read on the motion. From an examination of the contents of those, our opinion is strengthened as to the views already expressed. There can be no doubt, from the statement of McClintoc, and all those who testify on the part of the bank, that McClintoc had no authority whatever, from Sloo, to make the power of attorney. The judgment is also for a much larger sum than was actually due at the time, it embracing contingent liabilities not then at maturity, and was, in fact, entered up for \$14,222 61 more than was due, being the amount remitted on the next day after the Circuit Court refused to grant the application of Sloo.

An attempt is made to draw from some expressions of Sloo, an inference of his sanction of the act of McClintoc, long after the power had been signed and delivered. It may be doubted whether a subsequent agreement to, or assent of, the act of McClintoc, after the judgment had been rendered on an invalid power, would legalize the irregular and unauthorized confession; but it is sufficient in the present case to say that, in our opinion, the attempt to establish such assent or approval has signally failed.

In every aspect in which this case can be viewed, we have no hesitation in saying that the judgment of the Circuit Court is erroneous and void, as to Sloo, having been entered up without authority, and that the court below ought to have vacated the judgment on the application of Sloo.

Judgment reversed.

Semple, Eddy and D. J. Baker, for plaintiff.

Cowles, Logan, Ford and Gamble, for defendants.

(a). As to judgments by confession. Cooke's Stat. 262; *Sherman v. Baddely*, 11 Ill. R., 622; *Truett v. Wainright*, 4 Gilm. R., 417; *Lyon v. Bollvin*, 2 *ibid.*, 629; *Lake v. Cook*, 15 Ill. R., 356; *Wood v. Child*, 20 Ill. R., 209; *Fleming v. Jencks*, 22 *ibid.*, 475.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN JUNE TERM, 1838, AT VANDALIA.

BUTTERFIELD v. KENZIE.

1 Scam. R., 445.

Error to Cook.

Where a note or bill is made payable at a specific place, payment at such place need not be demanded by the holder in order to charge the drawer or indorser.

WILSON, C. J.—The only question presented for adjudication by the record in this cause, is whether or not in an action against the maker of a promissory note, or the acceptor of a bill, payable at a specified place, the plaintiff is bound to aver and prove a demand of payment at the time and place specified to maintain the action. The negative of this proposition is maintained by the plaintiff in error, and the affirmative by the defendant. Without going into an examination of the numerous decisions bearing upon the question, or the reasons advanced in support of those decisions, this court has no hesitation in saying, that the weight and current of authorities fully sustain the position assumed by the plaintiff. It is not a question of first impression, but one which has been so repeatedly decided, that this court does not feel itself called upon to examine the reasons upon which former decisions have been maintained.

Judgment reversed.

Butterfield and Collins, for plaintiff.

Grant, for defendant.

LOCKWOOD and SMITH, Justices, were not present at this term.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1838, AT VANDALIA.

GODFREY *v.* BUCKMASTER.

1 Scam. R., 447.

Error to Madison.

1. Demands upon several notes, executed by the defendant to the plaintiff, may be included in one count of a declaration.
2. A judgment will be rendered for the plaintiff on overruling a demurrer to his declaration.
3. If a defendant wishes to plead after an adverse decision upon his demurrer to the plaintiff's declaration, he must ask leave of the inferior court to withdraw his demurrer.

SMITH, J.—The plaintiff counted on six several promissory notes, made payable at the same time, for the sum of one thousand dollars each, and included the whole of the notes in a single count of the declaration. The count describes the notes according to their tenor and legal effect; and assigns the breach of the promise to pay, as to each and to the whole of the notes.

To this declaration the defendants specially demurred, and assigned for cause, a want of form by joining the notes in the same count. The Circuit Court, holding the demurrer not well taken, overruled it, and rendered final judgment for the plaintiff. A writ of error has been prosecuted, and it is now assigned for error—First, That the declaration contains different and distinct causes of action, in one count, and that this count is therefore double; Secondly, That the judgment on the demurrer should have been *respondeas ouster*.

It is now argued by the counsel for the plaintiffs in error, that although the several and distinct promises of the defendants could be joined in one action, yet the promises being several and distinct, they should have been declared on in separate and distinct counts.

To this position it may be remarked, that the present case is not one of a misjoinder of causes of action so different in their nature as

to fall within the rule which would render a declaration bad, because of such joinder; nor can we perceive how it is a cause even for special demurrer, for want of form. The count is no way defective in its form, but it is said to be defective in substance, because it combines the six notes in the description thereof, and has assigned the breach of non-payment of all, in the same count. And it is further insisted, that each note should have been set out in different counts; and, that not being done, the declaration is double.

The cause assigned in the special demurrer, and the argument used to support it, are inconsistent. One alleges the want of form as the defect, and the argument charges the act of joining the notes, in the description of them in the count, as matter of substance, and insists on this ground, that this fact sustains the want of form alleged.

There is no misdescription, no incongruity, or want of accuracy, or certainty in the count, which is even formally perfect; and hence the cause of demurrer assigned, is not established. We are entirely satisfied that no valid objection can be raised to the count.

The six notes are identical with each other, being for the same sum, of the same date, and payable at the same time; and might well be joined in the same count most conveniently, without ambiguity or perplexity. Indeed it is most desirable, where it can be done without producing confusion, when the causes of action are of the same nature, and may be clearly set forth together, that this mode of declaring should be adopted. No possible embarrassment can arise, for the defendant may avail himself of every defence. He may plead specially to each note separate matters of defence; or he may plead the general issue and give special matter in evidence, in defence to any or to all the notes. Suppose, instead of the six notes, there had been but one payable by installments on six different days, would it be objected that the promises and breaches could not be set forth in the same count? We apprehend not. The promises then being on separate pieces of paper, will not surely change the rule, nor the reason of it; nor can the count be double, because it describes several notes. The description of the six notes in separate counts, would have been no more clearly nor accurately described than they have been in one; and the useless verbiage, which would, in framing them, have to be observed, is thus desirably avoided.

The authorities cited by the counsel for the plaintiffs in error, and particularly those in Gould's Pleading, are far from sustaining the grounds assumed in support of the writ of error, while those in the 4th and 13th Johnson's Reports, clearly sustain the court. In our

Godfrey v. Buckmaster.

Linn v. Buckingham.

Hunter v. The People.

system of practice it is of infinite importance to introduce precision and conciseness; and whatever tends to dispense with prolixity and useless recapitulation, should be encouraged.

On the second point the practice is plain. The judgment in chief was correct. If the defendants wished to plead to the merits of the action, they should have withdrawn their demurrer, and applied to the court to answer over. This doubtless would have been granted. It could not compel the withdrawal of the demurrer; and as the defendants choose to stand by it, the Circuit Court could render no other than a final judgment on the pleadings as they stood.

Judgment affirmed.

Cowles and *Krum*, for plaintiffs.

Martin, for defendant.



LINN v. BUCKINGHAM.

1 Scam. R., 451.

Error to Fayette.

1. DECLARATION on a note made by William Linn; proof—a note signed, Wm. Linn—no variance.

2. The execution of a note cannot be put in issue, unless the fact is denied by plea and affidavit.

3. A bond for costs indorsed upon the back of a declaration filed in the proper court, is sufficient, although the bond does not state the court in which the suit is pending.

4. A bond for costs signed in the name of a law partnership is valid.

Judgment affirmed.

Davis and *Forman*, for plaintiff.



HUNTER v. THE PEOPLE.

1 Scam. R., 453.

Error to Edgar.

1. Where four persons are indicted for riot in the Circuit Court of one county, and one of the defendants obtains a change of venue to another county, the original indictment should be sent with the transcript to the latter county.

2. When an indictment against several is disposed of as to one, in the Circuit Court of a county to which the venue was changed, it is the duty of the court to which the venue was thus transferred, to order a return of the original indictment to the Circuit Court in which it was found, to the end that the other defendants may be tried. If the court neglects its duty, but the indictment is voluntarily returned, the other defendants cannot avail themselves of the omission.

SMITH, J.—This case is submitted on the following agreed state of

facts. The defendants were jointly indicted at the April term of the Circuit Court of Edgar county, 1837, for a *riot*. At the September term of the same year, Andrew Hunter, one of the defendants, applied for a change of venue, for himself only, which was ordered, and the indictment, together with the other papers in the cause, were transmitted to the Clark Circuit Court, where Andrew Hunter was tried at the November term, 1837. After the trial in the Clark Circuit Court, the same indictment on which Andrew Hunter was tried, was brought back to the Edgar Circuit Court, without any order of the court therefor; and William Hunter, Bartholomew Whalen, and James Whalen were called to plead to the indictment. It is now submitted by the attorney for the people, and the counsel for the defendants, who did not join in the change of venue, whether or not the Circuit Court of Edgar county was ousted of its jurisdiction over them, by the change of venue to Clark Circuit Court.

In the case of *Clark v. The People*, decided in this court in 1833, it is said, "It is argued that if the venue should be changed on the application of one of several defendants indicted jointly, that it would be difficult if not impossible to try the others—as the indictment would have to be sent to the adjoining county with the accused." The only point decided in that case was, the right of one of several defendants indicted jointly, to a change of venue, which the Circuit Court had refused, which judgment was reversed.

It is not to be disguised that the act allowing a change of venue, in regard to criminal offences, is extremely defective; and particularly as to the disposition which shall be made of the other defendants, after a change of venue, and trial shall have been had as to one or more of them. No provision is made for the disposition of the indictment by the court to which it is transmitted, after the change of venue is awarded, and its final action has been had on the party who sought the change. The policy of the act, in its present shape, may well be doubted—and however just the principles on which it has been founded, from the means it affords, there can be no doubt that it is often resorted to, and used in many cases, for the prostration of the criminal justice of the country. Its terms are too general and indefinite—and no corroborating facts, or the details of circumstances, to establish the truth of the cause for the change sworn to by the defendant, to sustain his belief, is required.

If he swears, in his mere belief, that any one of the causes named in the statute exists, no matter how or by what means or information he has arrived at the conclusion—nor how improbable or untrue it may appear, no discretion is left to the court to determine the justice

of the application. The change must be awarded.—The present case must be decided on its own merits. The court, in its own opinion (in the case of *Clark v. The People*) merely recapitulated the arguments of counsel, without at all admitting, much less deciding, that a defendant in a case like the present, could not be properly and legally tried, notwithstanding the embarrassments suggested.

The case, in the agreement of submission, admits that the indictment was returned to the Circuit Court of Edgar, without an order; and, on looking into the record, it does not appear how the indictment was remanded or returned. The only question, then, to be determined under the case made is, whether the Circuit Court of Edgar county ever lost jurisdiction of the cause, as relates to the three defendants who did not desire a change of venue.

It must be conceded that they could not be tried in the Circuit Court of Clark, to which the venue of the cause in regard to the other defendant, without their consent, was changed; and indeed it might well be questioned whether even by consent the Circuit Court of Clark could take cognizance of the case.—The indictment, for all legal purposes, must be considered as still remaining under the control of the Circuit Court of Edgar county; and no trial could be had elsewhere. The Circuit Court of Clark should have entered an order causing the indictment to be returned to the Circuit Court of Edgar, retaining a copy on its records—but although this was not done, it does not follow that the court of Edgar was ever ousted of its jurisdiction, as to the three other defendants; and as the indictment was returned to the court where it was found, it is not considered important, whether it was done in pursuance of a formal order of the Clark Circuit Court, on its records, or by the direction of the court verbally to its clerk. It was properly returned, although the law is silent as to the manner of the return.—If this is not regular and sanctioned by legal rule, public justice might be defeated in numerous instances. No injustice is done the defendants. They are deprived of no right whatever; nor is any obstacle or inconvenience created thereby.

As the statute, allowing the change of venue, is silent as to the future disposition of the cause, after trial of those who have sought the change of venue, it might equally be said, that the court to which the indictment is sent, has no power to remand the indictment; and if so, there would be a complete failure of justice. No principle of decision should be adopted unless it is just and reasonable in its character; and where the contrary would manifestly be the result, it ought to be avoided, unless the grounds of inevitable necessity inter-

Hunter v. The People.

Duncan v. The People.

The People v. Pearson.

pose another or a modified course. It is then inconsistent with the reason, the right, and the justice of the case, that the defendants should escape a trial for the offence charged, by the act of their co-defendant, in taking the change of venue; and we can perceive no sufficient reason for arresting the judgment rendered in this cause.

Judgment affirmed.

Ficklin, for plaintiffs.

French, State attorney, for defendants.



DUNCAN v. THE PEOPLE.

1 SCAM. R., 456.

Error to Clinton.

1. THE caption to an indictment is not a count, nor a portion thereof.

2. Where there are two counts in an indictment, and the first is quashed, the caption of the indictment remains undisturbed, and the second count is referable thereto.

Judgment affirmed.

Cowles, *Krum* and *J. Reynolds*, for plaintiff.

Olney, attorney-general, for defendants.



THE PEOPLE v. PEARSON.

1 SCAM. R., 458.

Application for a Mandamus.

1. WHERE a plaintiff counts upon a promissory note, and adds to his declaration the common money counts—files a copy of the note, but no copy of *an account*, and offers to stipulate that the note constitutes his sole cause of action; it is erroneous to continue the cause on the application of the defendant. (a)

2. A note is admissible under the money counts.

3. The Supreme Court will exercise its appellate jurisdiction, and exercise its supervisory control over inferior tribunals, where the necessities of the case require it.

Mandamus awarded.

Butterfield and *Collins*, for plaintiffs.

Grant and *Peyton*, for defendant.

Edwards v. Todd.

EDWARDS v. TODD.

1 Scam. R., 462.

Appeal from Cook.

Unliquidated damages arising out of a breach of the contract sued upon, constitute the subject matter of a set-off under our statute. (a)

SMITH, J.—This was an action of *assumpsit* to recover the amount of freight agreed to be paid for the transportation and delivery of a certain quantity of merchandise, from Buffalo, in New York, to the port of Chicago, in the State of Illinois.

The declaration contains the usual counts. The defendants pleaded the general issue, and gave notice of their intention to give in evidence, under that plea, that a portion of the goods agreed to be transported, exceeding in value the whole amount of the freight claimed, was, through the negligence, carelessness, and improper conduct of the plaintiff, lost and destroyed on the voyage. On the trial, the defendants offered to introduce such evidence, first, by way of set-off, and secondly, by way of reducing the amount sought to be recovered in the action.

The Circuit Court rejected the evidence as inadmissible, deciding that the plaintiff was entitled to recover freight as charged, on such portions of merchandise as had been safely transported and delivered to the defendants, and had been received by them; and that it was not competent, in this action, for the defendants to set off the value of the merchandise lost, under their notice; nor could it be introduced for the purpose of reducing the amount of freight contracted to be paid, and due for such portions of the goods as had been delivered to the defendants, and received by them. This instruction of the Circuit Court, being excepted to on the trial, is now assigned among other causes for error.

The question thus presented for consideration, will necessarily involve a decision on, and a just and reasonable interpretation of, our statute allowing set-offs. By the 17th section of the practice act, approved 29th January, 1827, it is provided that "The defendant, or defendants in any action brought on a contract or agreement, either express or implied, having claims or demands against the plaintiff or plaintiffs in such action, may plead the same or give notice thereof, under the general issue, as is provided in the 12th section of the act; or under the plea of payment—and the same or such part thereof, as the defendant or defendants shall prove on trial, shall be set off and allowed against the plaintiff's demand." The 12th section, referred to in this provision, declares that "the defendant may plead the general issue, and give notice of the special matter intended to be

relied on as a defence on the trial ; under which notice the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon."

In the investigation to be made on this point, it is important to inquire, whether the "claim or demand" of the defendants, being of an unliquidated character, forming a distinct breach of a portion of the plaintiff's contract to transport and deliver the merchandise, and which would form a substantive cause of action in itself against him, could, under the section of the act quoted, be the subject of a set-off. The liability of the plaintiff, to account for the merchandise received by him, and agreed to be transported by his bill of lading, and alleged to be lost, must depend on the fact whether the loss was occasioned by the dangers of the navigation, which were excepted in the bill of lading, or by the negligence and unskillful conduct of the plaintiff, in the management and navigation of the vessel of which he was the master. The proof of negligence and unskillful conduct devolved on the defendants to establish ; and if proved, would render the master, who is plaintiff in the action, liable to answer for the loss occasioned by his own misconduct and ignorance ; and, though it is conceded, would necessarily involve a complication of facts and questions to be decided, yet, for many good reasons of policy and justice, should be inquired into, and allowed to be set off against the plaintiff's demand, to the amount of the actual value of the merchandise proved to have been thus lost or destroyed. It cannot be denied, that in an action against the master as a common carrier, he would be liable to refund to the extent of the injury sustained, under such a state of facts ; and if by a reasonable interpretation of the act allowing set-offs, and without a perversion of its obvious import, this can be done, no good reason can be shown why the defendants should be driven to seek redress in a separate action against the master of the vessel.

The language of our act in the section quoted, is, that the defendant in any action brought on any contract or agreement, either express or implied, having claims or demands against the plaintiff in the action, such claims or demands "shall, on proof, be set off and allowed against the plaintiff's demand." This section then defines by its terms all actions arising *ex contractu* ; and would seem necessarily to have given an interpretation to the nature of the claim or demand, which it is declared shall be set off against the plaintiff's claim, for the recovery of which he has brought his action. Set-offs are to be mutual, it is agreed ; and in the present case the defendants ask no more than the right of charging the plaintiff with the value of the goods which he has not delivered conformably to the terms of his

contract ; and which, they allege, have, by his own acts of unskillfulness and negligence, been lost.

The gist of the right to make the set-off, arises from the failure to perform that portion of the plaintiff's contract which embraced the stipulation to deliver the lost goods, as well as those not lost ; and the plaintiff does not seek to recover freight for any other portion than those that were delivered and accepted by the defendants.

The performance by the master of the vessel, of his part of the contract on which the action itself is founded, and whether or not he shall be excused for the non-performance of a portion of it, by reason of the loss occasioned by the dangers of navigation, without any act of his, arising from ignorance of his profession or negligence on his part, is then the matter in controversy. The investigation, then, is confined to an ascertainment of the performance of the contract between the parties, according to its import and legal effect ; and no objection is perceived to a course which involves the inquiry, whether the contract has been so performed as to entitle the plaintiff to recover the whole, or a part of the compensation agreed to be allowed for the service stipulated to be performed ; or whether by his own acts of negligence and ignorance, he has, in the attempts to do such service, occasioned a loss to the defendants for which he is accountable ; and which should be deducted from the compensation for such portion of the contract as has been well performed.

The section allowing set-offs is peculiar in its phraseology, and differs most materially from the English statute concerning set-offs, as, also, from that of Kentucky, and from that of several of the other States of the Union ; and is altogether different from that which was enacted in this State in 1819, and which existed until the present act repealed it.

The decision referred to by the plaintiff's counsel, in Dana's Reports, was decided under the act of Kentucky, which declares, that where any suit for debt or demand is depending it shall be lawful for the defendant, on the trial, if the plaintiff be indebted to him, to plead the same in discount or by way of set-off ; and it is decided in that case, "That this statute meant moneyed demand in its strictest legal sense, and rendered it of about the same signification as debt."

The act 2 George II. declares, "That where there are mutual debts between the plaintiff and defendant, one debt may be set off against the other."

This act was amended by the act 8 George II., it having been doubted whether mutual debts of a different nature could be set off

against each other; and it was declared, that notwithstanding such debts were deemed in law to be of a different nature, still they were allowed to be set off, unless in cases where a debt accrued by reason of a penalty declared in a bond, in which case a special provision is made, that the same shall be pleaded in bar, so that no more shall be allowed than is justly due.

The 10th section of the act of the 22d March, 1819, provided that, "If two or more dealing together, be indebted to each other on bonds, bills, bargains, promises, accounts, or the like, and one of them commence an action in any court, if the defendant cannot gainsay the deed, bargain, or assumption, on which he is sued, it shall be lawful for such defendant to plead payment of all or a part of the debt or sum demanded; and give such bond, bill, receipt, account, or bargain, in evidence."

From an examination of this statute, as comprehensive as it may be, it appears, by the term "*claim or demand*," used in the present act, to have been the intention of the legislature to place the right of set-off on a still broader foundation; and to have embraced a class of claims and demands which could not have been set off under the act of 1819, of this State. Under the British act, that of Kentucky, and the act of our General Assembly of 1819, not a doubt could exist, that the set-off was required to be mutual, and could not be of an unliquidated character. By the common law, before the statute of set-off, where there were mutual cross demands unconnected with each other, a defendant could not in a court of law defeat the action, by establishing that the plaintiff was indebted to him, even in a larger sum than that sought to be recovered; and relief could only be obtained in a court of equity. Yet, at common law, and before the enactment of the statute of set-off, a defendant was entitled to retain, or claim by way of deduction, all just allowances or demands accruing to him, or payments made by him in respect to the same transaction or account which forms the ground of action. This cannot be strictly considered a set-off, but is in the nature of a deduction.

Under this rule, the defendants might be supposed to have had the right of showing that the goods not delivered, were lost by the causes alleged, and as their value was readily ascertainable and susceptible of accurate proof, by showing their cost at the place of purchase, they were entitled to have their value deducted from the plaintiff's claim for compensation.

The claim would not partake of that uncertain character which marks cases of unliquidated damages, which are sought to be recovered in actions arising from causes purely *ex delicto*; and which, it is

Edwards v. Todd.

Hubbard v. Freer.

equally certain, were not intended to be embraced within the terms "claim or demand," and which are to be confined to such as arise from "contracts or agreements, express or implied," as specified in the section allowing set-offs; and beyond which, being the boundary, we are not to pass.

As the plaintiff would be liable for the loss of the merchandise, in an ordinary action of assumpsit; and as it is manifest that our law allowing set-offs, not only embraces cases not comprehended in the British and American statutes referred to, and has been greatly extended beyond those embraced in the act of 1819, it would be incorrect to apply the decisions made under those laws to the present act, as evidence that the interpretation of the act should be the same. Some doubts have heretofore existed as to the true construction of this act, but when we reflect on the intention of its framers, and the objects it was intended to accomplish, those doubts must be dissipated.

From a careful and attentive examination and consideration of the question submitted in this case, we are of opinion that the Circuit Court ought to have admitted the evidence proposed to be offered; and that it was admissible under the pleadings, as well in the nature of a set-off, as, also, for the purpose of reducing the amount sought to be recovered by the plaintiff.

Judgment reversed.

Ford, for appellant.

Grant, for appellee.

(a) Cooke's Stat., 254, sec. 19. Decisions: *Sargeant v. Kellogg*, 5 Gilm. R., 277; *Nichols v. Ruckells*, 3 Scam. R., 300; *Hamlin v. Kingsley*, 12 Ill. R., 343; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. R., 25; *Hawks v. Lands*, 3 ibid., 282.

Distinction between set-off and *recoupment*, and when the latter is available. *Stow v. Yarwood*, 14 Ill. R., 426.

HUBBARD v. FREER.

1 Scam. R., 467.

Appcal from the Municipal Court of Chicago.

If an appeal bond is insufficient, the statute is imperative that the court shall permit the appellant to file a new one in all cases of appeal from justices of the peace.

Judgment reversed.

Grant and Peyton, for appellant.

Berry v. Hamby.

Brown v. Knower.

BERRY v. HAMBY.

1 Scam. R., 468.

Appeal from Alexander.

A county treasurer cannot take a note for a debt due the county, nor can he convey title by assignment to another.

SMITH, J.—This was an action by *petition and summons*, on a promissory note payable to the "Treasurer of Alexander county," for one hundred dollars, and assigned by the treasurer to the plaintiff in this action.

The petition avers that at the time of the making of the note, and at the assignment, the assignor was the treasurer of the county. The defendant cravedoyer of the note and the assignment, and demurred. The Circuit Court overruled the demurrer, and gave judgment for the amount of the note.

This decision is alleged for error, and the points are now made, that the note is a void and inoperative instrument, the treasurer of Alexander county not being a person capable in law of contracting, and having no authority to assign the note. We have no doubt on both the points made. The treasurer of the county had no authority whatever to take a note payable to himself as treasurer. His duties are prescribed in the revenue law creating the office; and no power is given him in the act, to take notes or securities in his official character from any person; nor is he created an artificial person in law, capable of suing as treasurer; consequently no suit could be maintained in the name of the treasurer. As the treasurer could not take the note, the assignment was equally nugatory. He could not confer on the assignee a right which he did not possess himself; nor could he, by the assignment in the name of Thomas Howard, treasurer of Alexander county, vest an interest in the plaintiff, to enable him to maintain an action in his own name on the note. Whether an action in the name of the county could be sustained for money had and received, or money loaned and advanced, is not now before us for adjudication.

Judgment reversed.

David J. Baker, for appellant.

Davis and Forman, for appellee.

BROWN v. KNOWER.

1 Scam. R., 469.

Error to Municipal Court of Chicago.

1. WHERE several persons consecutively endorse a note they are severally and not jointly liable to the assignees.

Brown v. Knower. Gilbert v. Maggard. Townsend v. Briggs. People v. Pearson.

2. Diligence by suit is necessary to charge the assignor of a note under the statute.

Judgment reversed.

Butterfield, for plaintiff.

Arnold, for defendant.



GILBERT v. MAGGORD.

1 Scam. R., 471.

Error to Will.

1. WHERE the husband and wife join in the execution and acknowledgment of a mortgage of land, both are proper parties to a proceeding by *scire facias* to foreclose the same.

2. No error will be regarded by the Supreme Court, unless it is specifically assigned.

3. A demurrer to a replication is waived by a subsequent rejoinder.

Judgment affirmed.

Strode, Grant, Scammon and Spring, for plaintiff.

Butterfield, for defendant.



TOWNSEND v. BRIGGS.

1 Scam. R., 472.

Error to Schuyler.

A PROMISE made by a purchaser of a portion of the public lands of the United States, subsequently to the purchase, to pay for improvements made thereon previous to the sale of the same, is without consideration and void.

Judgment reversed.

T. L. Dickey, for plaintiff.



PEOPLE v. PEARSON.

1 Scam. R., 473.

Mandamus.

IN an action upon a bill of exchange which contains a special count on the bill, and also the usual money counts, if the plaintiff attaches a copy of the bill to the declaration, it is unnecessary to file also a copy of an account.

Mandamus awarded.

Butterfield and Collins, for relator.

Arnold and Ogden, for respondent.

Day v. Cushman.

Guykowski v. The People.

DAY v. CUSHMAN.

1 Scam. R., 475.

Error to La Salle.

1. In *sci. fa.* to foreclose a mortgage, the writ should aver the christian and surnames of the mortgagees, and if they constitute a firm of co-partners an averment that the mortgage was made to A B and Co. is insufficient.

2. Where a mortgage payable in installments is sought to be enforced, the writ of *sci. fa.* should show that the last installment has become due and payable.

In *sci. fa.* to foreclose a mortgage, the statute must be strictly followed.

*Judgment reversed.**Grant and Peyton*, for plaintiff.*Davis and Forman*, for defendant.

GUYKOWSKI v. THE PEOPLE.

1 Scam. R., 476.

Error to Clinton.

1. In capital cases a prisoner stands upon all of his rights, and cannot be presumed to waive any irregularity.
2. An alien is an incompetent juror under the statute.
3. On a motion for a new trial in a capital case the affidavit of the prisoner is *prima facie* evidence against the people.
4. A lost *venire* may be filed *nunc pro tunc* in a capital case after verdict.
5. Formal objections to an indictment must be made by motion to quash before the trial.

SMITH, J.—The prisoner, Guykowski, was indicted for the *murder* of one Nelson Ryall, at a special term of the Fayette Circuit Court, held under the provisions of the ninth section of “*An Act regulating the times of holding the Supreme and Circuit Courts,*” and for other purposes, approved 15th February, 1835, which authorizes the holding of such terms, at the request of a prisoner charged with a capital offence, when he may demand a speedy trial. At this special term, the court ordered a precept for summoning a grand and petit jury, to be filed *nunc pro tunc*, in consequence of the loss of the first one, by the sheriff.

The counsel for the prisoner challenged the array of the grand jury for this cause, but subsequently withdrew his objection. The attorney-general, on behalf of the prosecution, renewed it, and the court overruled the exception. The prisoner then challenged some of the grand jurors for cause. After the indictment was found, the prisoner

applied for, and obtained a change of venue, to the Circuit Court of the county of Clinton. He was there tried and convicted at a regular term of that court. After conviction, his counsel moved for a new trial, and an arrest of judgment, both of which motions were overruled, and sentence of death pronounced. A writ of error having been sued out, and a supersedeas awarded, in pursuance of the 189th section of the "*Act relative to Criminal Jurisprudence*," and the case being before the court for revision, it is now assigned for error,—

1. That the Circuit Court ought to have awarded a new trial, because one of the jurors, who tried the cause, was an alien at the time of the trial, and therefore not qualified to serve as a juror: such alienage being at such time unknown to the prisoner.

2. That the motion in arrest of judgment ought to have prevailed, because the person signing the indictment was not the attorney-general, nor authorized by law to sign the same. Also, because it is not set forth in the body of the indictment, that the grand jury had the authority to find the same; because it is not averred in the indictment that the court was called specially for the trial of the prisoner; and because a precept for summoning the grand jury at the special term of the Fayette Circuit Court had been filed *nunc pro tunc*.

The delicate and responsible trust which this tribunal is called on to exercise, in reviewing cases of the character under consideration, sufficiently admonishes it of the caution and prudence with which such reëxaminations should be conducted; and that, where there is every reason to believe, from an inspection of the proceedings, that the intrinsic merits of the case have been fairly ascertained and determined, the adjudication of the inferior tribunal should not be disturbed, unless it satisfactorily appear that some settled and well established principle of criminal law, or rule of proceeding, has been clearly violated.

While the justice of the rule here asserted is admitted, and an adherence to its principles conceded, it is of equal importance that the rights of the accused should be protected and preserved, and the essential forms of law prescribed for the mode of conducting the ascertainment of his guilt, should be carefully observed and followed. A departure from them could not fail to produce difficulties and doubts. A recognition of a departure, in one case, might lead to the adoption of another, and finally, those barriers, which are guaranties for the regular and impartial conducting of criminal cases, might be frittered away, and cause interminable perplexities, and possibly eventuate in gross injustice. It is much easier to require the obser-

vance of the mandates of the law, than to determine in what cases they may safely be dispensed with.

It is, therefore, more proper, and more consonant to reason and justice, to require a substantial adherence, than to suffer innovations upon the known and positive rules prescribed by law, for the regular conducting of causes. The justice of these grounds is as clear and apparent, as those which are founded on principles of humanity, and by which the administration of criminal law has been marked, declare that the accused stands on all his rights, and waives nothing which is irregular, and more especially so, when life is in question.

Testing the present case by the principles here recognized, and applying them to the facts of the case, it will be perceived that the first objection presents grounds deserving attentive and grave consideration. The bill of exceptions discloses the fact, that after the conviction of the prisoner, an application for a new trial was made, based on his deposition, which disclosed the fact that John Burnside, one of the jurors who had rendered the verdict, was an alien, as he had been then, for the first time, informed, and believed, that such information came to his knowledge since his conviction. On this deposition the inquiry arises,—1st. Whether the juror, admitting the fact of alienship to be true, was an unqualified juror, and if so, whether the verdict was not void for that cause. 2d. Whether the deposition of the prisoner was sufficient evidence of the fact of alienship, and was admissible as evidence of the fact. To determine the first inquiry, as to the competency of the juror, we must recur to the act prescribing the mode of summoning grand and petit jurors; and defining their qualifications and duties, in force 1st June, 1827. By that act it is declared, that "All free and white male taxable inhabitants, in any county in this State, being natural born citizens of the United States, or naturalized according to the Constitution and laws of the United States, and of this State, between the ages of twenty-one and sixty years, not disabled, by the commission of crime, or bodily infirmity, and being of sound mind and discretion, shall be deemed and considered competent persons to serve on grand and petit juries."

From this section there can be no doubt whatever, that an alien is not qualified to serve as a juror in any case. The declaration that certain qualifications are necessary to be possessed by the individual, to constitute him a juror, necessarily disqualify the person who does not possess such qualifications, from being one. It is not a mere personal exemption from service which the individual may claim, but an entire exclusion from such service. The persons who are entitled to personal exemption from service, are enumerated in the act. An

alien is not capable in law to discharge the functions of a juror. In a cause where an alien serves as a juror, he cannot be considered the lawful juror whom the sheriff is called on to summon for the trial of the cause. He is not, in the language of the common law, free from all exception, but is prohibited from sitting as a juror; and although he is not challenged, and the accused may be considered as tacitly consenting by not objecting to his serving on the jury, still he cannot be rendered competent to serve by the presumed assent of the accused, because the law has not admitted him to act in such capacity.

It may, also, be fairly presumed, that it was incumbent on the prosecution, to take care that the jurors were competent and legally qualified according to the provisions of the law, under which they were chosen and selected.

The verdict cannot be considered as the unanimous opinion of twelve persons capable in law of determining the law and the facts submitted to their consideration and decision; but as the opinion of eleven only; the other being disqualified from being one of their number. The verdict is a nullity, not having been obtained as the law has required.

The second branch of the question under consideration, whether the deposition of the prisoner was sufficient evidence of the facts of alienage, and was admissible to prove such fact, can be determined only from the circumstances which appear in the case, and the reasons which may be drawn from the admission of such depositions in other cases. In civil cases, the deposition of the defendant of the existence of particular facts, before unknown, and of newly discovered evidence, for the purpose of moving for a new trial, is frequently received, and the admissibility thereof has not, we believe, been questioned; and numerous new trials have been granted on facts disclosed by such depositions. If this rule obtains, in civil cases, we do not perceive any objection to it in criminal ones, subject to the right on the part of the prosecution, to disprove by counter evidence, the truth of the facts alleged by the accused.

It may be urged that a party, after conviction of a flagrant crime, for the purpose of obtaining another trial, or the procrastination of the judgment of the law, would not hesitate to resort to these means, as an expedient for the accomplishment of an object so desirable to him; and that perjury might readily be conceived to be the consequence of the adoption of such a rule. This reasoning is not just, because although the party may make his application founded on his own deposition, it does not follow, by any means, that this deposition is to be conclusive. The facts alleged, as the grounds of the application, being open to be contradicted by the prosecution, if false, might be shown to be so, and

hence it is not rational to suppose, that the application would be made on an alleged state of facts, easily disproved, or rendered doubtful by counter evidence, because of the certainty of failure in all such cases.

In the case before us, how easily could the prosecution have produced the juror, Burnside, or his deposition, and proven his non-alien-ship, if such was the fact: and, in case of his absence, the evidence of his neighbors to the same fact. This, we presume, would have readily occurred to the prosecution as the most efficient means of removing the alleged objection to the verdict. Not having done so, is it not the fair inference therefrom that the deposition of the prisoner is true? This deposition was, doubtless, only *prima facie* evidence of the fact; but does not the failure or omission to produce the proof so entirely within the ability of the prosecution to adduce (if the deposition of the prisoner was untrue in point of fact), render it almost conclusive? We must presume, then, under this state of facts, that the alienship of the juror would have been confirmed by the juror himself; otherwise it seems to us, that an attempt would have been made to disprove it, by some of the means suggested.

This deposition of the juror in support of his verdict, on a point entirely disconnected with his acts, or the motives for his conduct, as a juror, would not have been objectionable, on the grounds on which it has been decided that a juror's testimony cannot be received to impeach his verdict.

It may also be urged, that the exception to the juror is technical, and that, as no objection appears on the merits, the conviction should be sustained.

We cannot think that an objection to a trial and conviction produced by the agency of one whom the law has positively prohibited from sitting as a juror in a cause, can be considered technical. It is a matter of substance, and may be considered an inquiry whether one who is excluded, has taken on himself to pronounce on the law and the facts of the case, without, not only, the authority of law, but against such authority.

The presumed assent of the accused to the juror's being one of his triers, cannot surely invest the juror with the exercise of a power which the law has declared him incapable of exercising. Suppose the case of a female imposed on the court and parties without their privity, or even with it: Could such a person be a competent juror? Would not all deny the affirmative, in such a case? And although such an opinion would be rendered without hesitation, the disqualification in this case is not less conclusive.

It is a false supposition, to conclude, that the silence of the accused could confer a power on the person sworn as the juror, to sit and determine the cause, when his inability to legally act is so apparent. Suppose that the alienage of the juror had been developed to the court, when the juror was called, and about to be sworn, can it be imagined that the court would have hesitated to have instantly set him aside, and declared him incompetent? We think not. Does then the time of the discovery of the juror's incompetency, alter the principle or the reason of the decision? In Massachusetts it has been decided, that a person who was a member of the grand jury, and sat and found the bill of indictment, in a criminal case, was an incompetent juror on the trial by the petit jury, on the same indictment, and a new trial was granted for such a cause. There are, also, many cases where partial jurors, who had formed and expressed opinions on the guilt of the accused, before trial, having rendered verdict against him, have been set aside, the knowledge of the cause of objection not having been known or discovered until after conviction.

In the case of the Indian Nomaque, decided at the December term of this court in 1825, we have said that "The prisoner, in a capital case, must be considered as standing on all his rights. He cannot be considered as waiving anything, nor could his counsel do it for him;" and the case of the People v. McRay, is cited, as conclusive authority to sustain such position. In this case, which was a criminal one, the venire was without a seal, and although the prisoner had challenged many of the jury who were summoned under it, still the court held, in that case, that it was a nullity, and granted a new trial. The principles on which these cases were decided are applicable to the present, and apply with full force.

The argument of inconvenience which might result from granting a new trial, ought not to be addressed to those whose duty compels them to declare the very law of the case, and more especially should its influence be unfelt where no discretion is reposed.

Much as this court may regret the necessity which imposes on it the duty of reversing a decision, where the trial on all the facts may be presumed to have been not only deliberately and impartially had, but freely investigated, still it is bound to declare the law as it is conscientiously believed to exist, without regard to the possible inconvenience which may result from a new trial.

The objections in arrest of judgment are considered not tenable: and if as formal ones, they possessed grounds of consideration, a part of them should have been raised before pleading to the indictment, as the 153d section of the criminal code requires. That

Guykowski v. The People.

Bliss v. Perryman.

portion of them which were made before pleading, which include the objection to the precept, are considered inconclusive. The precept for the grand jury, which was filed *nunc pro tunc*, was for the benefit of the prisoner, at whose instance the court had been assembled, and as he challenged the array, and afterward withdrew it, he must be considered as regarding the objection without force. It was but to render more certain and perfect the proceedings instituted for his benefit, and which had been adopted for the speedy trial which he had sought.

For the reasons assigned, we are of opinion that the judgment of the Circuit Court of Clinton county should be reversed, a supersedeas to the execution of the sentence of death awarded, and a new trial be had in the Clinton Circuit Court, and that a *venire facias de novo* be awarded by that court, for such purpose.

Judgment reversed.

Field and Shields, for plaintiff.

Olney, attorney-general, for defendant.



BLISS v. PERRYMAN.

1 Scam. R., 485.

Error to White.

1. The bond of an infant is voidable at least, if not absolutely void.
2. When a plaintiff relies upon the new promise of an infant, made after the latter comes of age, he should declare upon it, and not upon the original contract.

WILSON, C. J.—This case originated before a justice of the peace. The bill of exceptions taken on the trial contains all the proceedings, from which it appears that the plaintiff sued the defendant on a bond given by him for \$28. The defendant pleaded infancy, and sustained his plea by proof. The plaintiff then set up a promise made by the defendant after he came of age, to pay the plaintiff \$18 in lieu of the bond, but having failed in establishing this promise by disinterested testimony, he applied to the court (under the statute making the oath of the party evidence in certain cases) to have the defendant sworn to prove his subsequent promise. The court decided the evidence to be inadmissible, and refused to allow the party to be sworn. To reverse which opinion, this writ of error is prosecuted. It is clear that the plaintiff has mistaken the contract upon which he ought to have brought his action, and that the evidence which he offered was properly rejected. This evidence went to establish a different and distinct cause of action, from that upon which suit was brought. The

Bliss v. Perryman.

Waldo v. Averett.

action was instituted upon a contract under seal for the payment of a specific sum of money, while that sought to be established on the trial, by the testimony which was rejected, was a parol agreement, entered into at a different time, and for the payment of a different amount. The admission of such testimony would not only have changed the character of the action, and the nature of the defence, but would have been a surprise upon the defendant. The plaintiff should have brought his action upon the subsequent parol promise, and not upon the bond. An infant cannot bind himself by bond, even for necessities, and when the plaintiff relies upon a new promise made after full age, it is always necessary that he should declare upon the simple contract, which the new promise was meant to establish; and the infant will then be bound to the extent of his promise, even if the consideration of the original contract (for which the latter is substituted) was not for necessities.

Judgment affirmed.

Eddy, for plaintiff.

Webb, for defendant.

WALDO v. AVERETT.

1 Scam. R., 487.

Appeal from Morgan.

1. On an appeal from a justice to the Circuit Court, it is not necessary that the appeal bond should be executed in the presence of the clerk of the court. It is sufficient if the bond is filed in the clerk's office within the time prescribed by law, and the clerk *expressly* or *impliedly* approves of, or treats the bond as a legal obligation.
2. If upon the filing of a bond in an appeal cause, the clerk issues a summons and *supersedeas*, this state of facts raises the presumption that the clerk approved the appeal bond.
3. If an appeal bond is illegal, a new bond may be filed, and the appeal thus becomes perfected.

WILSON, C. J.—This was an appeal from the judgment of a justice of the peace to the Circuit Court, and by that court dismissed, because of the supposed insufficiency of the appeal bond. It appears by the bill of exceptions, that the bond was written by the clerk, and handed to the appellants to be signed by them and their sureties, which was accordingly done (though not in the office), and the bond lodged in the office with the clerk, upon which he issued a *supersedeas* to the justice.

This, we are of opinion, was a substantial compliance with the provision of the statute that requires the appeal bond to be entered into in the office of the clerk, and the security to be approved by him. Although the bond was not signed in the clerk's office, it was lodged there, as the law requires, and must have been approved by the clerk;

Waldo v. Averett.

Gordon v. Knapp.

otherwise he had no authority to allow an appeal, and to issue a supersedeas enjoining the justice from proceeding in the cause. But if it is admitted that the bond was ever so defective, the court nevertheless erred in dismissing the appeal; it ought to have allowed the motion of the appellants to file a good bond. The statute expressly provides for a case like this, by declaring that the appellant shall in nowise be prejudiced by reason of any informality or insufficiency of the appeal bond, provided he will, in a reasonable time, to be fixed by the court, execute and file in the office of the clerk, a good and sufficient one. This provision is conclusive as to the right of the appellant to file a new bond, when the first is adjudged by the court to be insufficient.

Judgment reversed.

W. Thomas, for appellant.

McConnel, for appellee.



GORDON v. KNAPP.

1 Scam. R., 488.

Appeal from Morgan.

1. A justice of the peace has jurisdiction in actions of debt and assumpsit, where the demand does not exceed one hundred dollars.
2. In civil and criminal cases a justice of the peace may, in cases of emergency, appoint a constable *pro tem.* to serve the summons or warrant. But he must indorse the appointment upon the back of the writ under his hand and seal.
3. When the justice acts under this statute, the facts must appear upon the face of his appointment, which authorize the act.

WILSON, C. J.—This was a suit brought before a justice of the peace upon an open account. Judgment was rendered by default against the appellant, for \$95, on the 6th of May, 1837, from which he appealed to the Circuit Court, and that court dismissed the appeal for want of jurisdiction. From this decision an appeal was taken to this court, and it is assigned for error, that the court dismissed the appeal, and also that it did not reverse the judgment of the justice. Upon what view of the case the court came to the conclusion that it had no jurisdiction, is left to conjecture, as no reason for such opinion is assigned. It is clear that the opinion of the court upon this point, is not warranted by the facts in the case. The suit is for a debt claimed to be due upon an open account, not exceeding one hundred dollars, being one of a class of cases over which the statute expressly confers jurisdiction upon justices of the peace. The sufficiency of the next error assigned, which is the refusal of the Circuit Court to reverse the judgment of the justice, depends upon the legality of the manner in

which the constable was appointed, and also upon the authority of the justice to appoint a constable in any manner in this case. It appears that the process was a summons, which was served by the constable *pro tem.* appointed by the justice, under authority of the "*Acts concerning Justices of the Peace and Constables.*" This act authorizes a justice to appoint a constable *pro tem.* in a criminal case, where there is a probability that a person charged with an indictable offence, will escape, and in a civil case, where goods and chattels are likely to be removed before application can be made to a qualified constable. It also provides that the appointment, in such cases, shall be made by a written indorsement on the back of the process under the seal of the justice. This indorsement may be regarded as the commission of the special constable, without which, his execution of the process intrusted to him, would be illegal and void. In this case, no indorsement deputing any one to act as constable, was made upon the process; but the temporary appointment was made upon a separate and distinct paper. This, it would seem, was not a compliance with the statute. The object of the law in requiring the appointment to be upon the process, was probably to apprise those whose obedience it commands, of the authority under which the officer acts. This is in accordance, too, with the general principle, which requires one acting under a special appointment, to show his authority.

The want of authority in the justice to appoint a constable to serve a summons, presents a stronger objection to the legality of the notice to the defendant below, than the mode of making it in this case. The statute specifies but two cases in which a justice is authorized to appoint a constable *pro tem.* The one is to execute criminal process, where the accused is likely to escape; and the other is to execute civil process, where goods and chattels are about to be removed before application can be made to a qualified constable; and in the latter case, as a prerequisite to the power of appointment, it must be shown that goods and chattels are about to be removed. In the present case, it does not appear that any evidence of a probability of the removal of property, was adduced. It is also manifest from this provision, that the process contemplated by the statute, and which the justice is authorized to depute an individual to execute, is not a summons to the individual, or other personal notice; for that would not prevent the removal of property beyond the jurisdiction of the court, but it is an execution or attachment against the personal property about to be removed, in order to secure to a creditor the means of satisfying his demand. And, as a justice is an officer of inferior and special powers, the existence of the causes which would justify him, in deputing an

Gordon v. Knapp.

Smith v. Shultz.

officer to execute process, should be shown; and the kind of process, and the mode of appointing the officer to execute it, should be in strict accordance with the statute, otherwise the appointment is void, and the service of the process a nullity. In this case, the constable was not appointed as the law requires, nor was the process such as he could be created to execute; and no cause having been shown, which could justify the appointment and the issuing of the process, the whole proceeding of the justice was irregular and void, and ought to have been reversed by the Circuit Court.

Judgment reversed.

W. Thomas, for appellant.

McConnel, for appellee.

SMITH v. SHULTZ.

1 Scam. R., 490.

Error to Vermilion.

1. Under the act of 1887, the refusal of the Circuit Court to grant a new trial may be assigned for error. (a)
2. The court will not grant a new trial where it is apparent that substantial justice has been done; though the law is with the defeated party.
3. The court will not grant a new trial upon the ground of newly discovered testimony, where the evidence is cumulative in its character.
4. Every tortious taking of the property of another does not amount to a larceny. *A felonious intent* must exist.

WILSON, C. J.—This was an action on the *case* for slander. The plaintiff in the court below sued the defendant for charging him with having stolen his corn and oats. The defendant pleaded not guilty, and gave notice under the statute, that on the trial of the cause he would prove that the plaintiff did take his corn and oats without his knowledge or consent; and also that he took it without his knowledge or consent, in the night time, and fed it to his hogs and horses.

Upon this plea and notice, the parties went to trial, and a verdict was found for the plaintiff. The defendant then moved the court for a new trial, upon the ground of newly discovered evidence. The affidavit, which was made by the defendant, sets out that he believes that since the trial of the cause, he has discovered that he can prove by Joshua Law and one other witness, that the plaintiff told one or both of them, that he did take the corn of the defendant, without his knowledge or consent. The court overruled the motion for a new trial, from which decision the defendant has taken this appeal. At common law, the decision of a court upon application addressed to its discretion, cannot be assigned for error, and such has been the uniform decision of this court. But by an act of the Legislature, this prin-

Smith v. Shultz.

ple of law has been changed, and an appeal will now lie from the decision of a court refusing an application for a new trial. The question then is, has the court erred in the exercise of its legal discretion, in overruling the motion made in this case. This should be clearly made out, to warrant a reversal of its opinion, upon a point, in relation to which, it has the best opportunity of forming a correct opinion. A court will not grant a new trial, when, in its opinion, substantial justice has been done between the parties, though the law arising on the evidence would have justified a different result; nor will it, upon the application of the defendant, afford him an opportunity of introducing newly discovered testimony, which is not conclusive in its character, or is merely cumulative. The evidence alleged by the defendant to have been discovered subsequently to the trial, would not, unaided by other circumstances, constitute a defence. The allegation in the declaration is that the defendant charged the plaintiff with larceny in stealing his corn and oats. The admissions of the plaintiff, expected to be proved, are, that he did take the corn of the defendant without his knowledge or consent. This is certainly good evidence as far as it goes; but it does not go far enough to establish upon the plaintiff the guilt of larceny. Every taking of the property of another, without his knowledge or consent, does not amount to larceny. To make it such, the taking must be accompanied by circumstances which demonstrate a felonious intention. No evidence of such intention is alleged to have been discovered, and the property may have been taken under a claim of title, or under other circumstances which would rebut all presumption of felonious intention. The bill of exceptions does not contain the testimony given on the trial; we cannot therefore know what evidence, or whether any, was given by the defendant under his notice of justification. If none was given tending to justify, the court very properly overruled the motion for a new trial, because the newly discovered evidence, does not, of itself, amount to a justification; and if on the other hand, any testimony tending to make out this defence, was given on the trial which was had, then that subsequently discovered is merely cumulative, and would not have justified the court in awarding a new trial, in order to readjudicate upon a cause, with the result of which it is satisfied.

Judgment affirmed.

McRoberts and French, for plaintiff.

Brown and J. P. Walker, for appellee.

Pickering v. Orange.

Wilson v. Campbell.

PICKERING v. ORANGE.

1 Scam. R., 493.

Appeal from Edwards.

If a person keeps a savage, ferocious, or mischievous dog, knowing his vicious propensities, he is liable for all injury occasioned thereby to the person or property of a stranger. (a)

BROWNE, J.—This was an action on the *case* for keeping dogs which had been used to bite mankind, and to chase, worry, and kill other animals besides sheep, and which had killed divers sheep of the plaintiff. On the trial of the cause, the judge of the Circuit Court of Edwards county, gave the following instruction: "That if defendant's dogs had been used to kill or worry sheep, and the defendant had notice thereof, then it was a question of law, and he was liable for all the damages they might do to the sheep of another, after such notice; but if they had been used to kill or to chase, bite, and worry other animals, the property of another, or to bite mankind, and the defendant knew it, it was a question of fact for the jury; and if, therefore, they found the ferocity of the dogs to be such, as to put a reasonable man upon his guard, and the defendant suffered, after notice, his dogs to go at large, then the defendant should be liable to the plaintiff for the amount of injury done." The jury found for the defendant below.

These instructions were clearly wrong. The law is well settled, that where a person negligently keeps dogs or other animals, which are known to him to be of a savage and ferocious disposition, the owner of the animals is accountable for all the injury they may do to others; and it is the duty of the owner of such animals to secure them, to keep them from doing mischief. *Judgment reversed.*

Gatewood, for appellant.

Cowles, for appellee.

(a) S. C. 1 Scam. R., 338.

WILSON v. CAMPBELL.

1 Scam. R., 493.

Appeal from Edwards.

1. WHERE two sign a bond, one as principal, the other as surety, both are liable as principals.

2. The only object of an obligor or promissor, attaching the word "*surety*" to his name, is to secure evidence as between the principal and surety in future actions.

Judgment affirmed.

Eddy, for appellant.

Webb, for appellee.

MASON v. FINCH.

1 Scam. R., 495.

Error to Madison.

A joint tenant or tenant in common may prosecute a forcible entry or detainer against his cotenant, where a forcible ouster or detention is established.

Lockwood, J.—Finch made complaint on oath before two justices of the peace, that he and Mason were joint tenants of a dwelling-house in the county of Madison, and that Mason, with force and arms, forcibly entered into the whole of the dwelling-house, and turned Finch out of the possession of his moiety of the house, and keeps him out; and prays of the justices, that he may be restored to the possession of the undivided half of the house.

On the trial of this complaint, before the justices, a verdict was found in favor of the defendant below, and the cause was removed into the Circuit Court by appeal.

In the Circuit Court, Mason moved the court, that the appeal be dismissed, because it appeared from the complaint of the plaintiff below, that the parties were joint tenants, and as the possession of one, is the possession of both in law, neither can maintain an action for forcible entry and detainer, against the other. The motion to dismiss was overruled by the court. On the trial of the cause in the Circuit Court, a verdict of guilty was found against the defendant below, and judgment rendered that the plaintiff be put in possession of the undivided moiety, or one half of the whole dwelling-house described in the complaint. To reverse this judgment, a writ of error has been brought to this court, and the only point made in the case, is, that one joint tenant cannot maintain an action of forcible entry and detainer against his co-tenant.

The act concerning forcible entry and detainer was passed to restrain persons from violently taking and keeping possession of lands and tenements, although they may have title, and gives to the party thus ejected, a summary remedy to restore him to his former possession.

In England, proceedings under their acts against forcible entries and detainers, are either by indictment, or by complaint to a justice of the peace, and in either case it is a criminal proceeding, and the defendant is liable to fine and imprisonment, and the injured party to a restoration of his possession. Our act furnishes a civil remedy, and the judgment of the justices only restores the party to the possession of the premises from which he has been forcibly ejected. The scope and

design of our act is the same with those of England, and consequently where a party may be indicted there for a forcible entry or detainer, a civil action may be maintained here. Our act is more comprehensive than the English, as it authorizes the action to be maintained against a lessee who holds over, after the determination of his lease, whether he holds by force or not, provided the lessor has given written notice to quit.

Can, then, a joint tenant in England, who has actually been ousted by his co-tenant, be proceeded against under their statutes?

Russell, a late English writer on crimes and indictable misdemeanors, lays down the law in relation to forcible entry and detainer, as follows, "A joint tenant, or tenant in common, may offend against them (the English acts on that subject) either by forcibly ejecting, or forcibly holding out, his companion, for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry does not excuse the violence done to his companion, and consequently an indictment of forcible entry into a moiety of a manor, etc., is good." Russell quotes Hawkins' Pleas of the Crown, a work of high authority, for this doctrine. If we consult the reason of the case, we can readily perceive good grounds why a joint tenant should be entitled to the benefit of this act. At common law, as before stated, one joint tenant cannot maintain trespass, *quare clausum fregit*, because the possession of joint tenant is the possession of both. A party, as much injured as if he held in severalty, is denied a remedy for an injury, upon a presumption in law which the facts of the case contradict. This is clearly a defect in the common law, which it may well be presumed that the act against forcible entry and detainer was intended to remedy. Although at common law one joint tenant cannot maintain trespass against his co-tenant, yet he may maintain ejectment if he can prove an actual ouster, which rebuts the presumption, that the possession of one is the possession of the other; and we can see no reason, if the ejected co-tenant may maintain ejectment, why he may not avail himself of the summary remedy furnished by this statute. In Kentucky the Court of Appeals decided that one joint tenant may maintain a warrant against his co-tenant for a forcible detainer, provided that the party prove that he is kept out by actual force, and the judgment would be for "an undivided interest" according to the proof.

Whether in the case under consideration such proof was given, is not made a point in the case, and it is therefore unnecessary to in-

Mason v. Finch.

Phillips v. Dana.

Miller v. Howell.

quire. Both reason and adjudged cases being in favor of sustaining this form of proceeding, the judgment of the Circuit Court must be affirmed with costs.

Judgment affirmed.

Cowles and Krum, for plaintiff.

Martin, for defendant.



PHILLIPS v. DANA.

1 Scam. R., 498.

Appeal from Peoria.

1. THE amendment of pleadings is discretionary with the inferior court, and the decision upon such application cannot be assigned for error.

2. Where an issue in fact is joined, and the cause is tried upon its merits, all irregularities are waived.

Judgment affirmed.

Purple, for appellant.

H. P. Johnson, for appellee.



MILLER v. HOWELL.

1 Scam. R., 499.

Appeal from Macoupin.

A representation made by the payee of a note without an intent to deceive and defraud, is no defence to an action upon the note.

LOCKWOOD, J.—This was an action of *assumpsit* commenced on a promissory note assigned to Howell, the plaintiff below, after it became due. After the note was read in evidence, Miller, the defendant below, proved that the note was given as the consideration of the sale of a town lot, which was bid off by him at a public sale of lots held by the assignors of the note, and that the defendant received from them a bond to convey the lot upon the payment of the note. The defendant, to show that the consideration of the note had failed, offered to prove that the payees of the note, as proprietors of the town in which the lot was situated, publicly proclaimed, on the day of the sale of the lot, that they would build a storehouse in the town, two stories high, forty by twenty-four feet, by the 1st of August following the day of sale; and that they would construct a bridge across the Big Macoupin, in the said town. Defendant further offered to prove that the payees of the note had failed to build the house and bridge.

Miller v. Howell.

Miller v. Honcke.

Williams v. Claytor.

To the reception of this testimony, the plaintiff objected, and it was rejected by the court. The rejection of this testimony is assigned for error. This testimony was properly rejected. It did not tend to show a failure of consideration. The consideration of the note was the sale of the lot for the conveyance of which Miller holds a bond. If the payees of the note should fail to convey the lot at the time stipulated in the bond, or if they had no title to the lot when it became their duty to convey—either of these facts would constitute a failure of consideration of the note. The declaration of the payees of the note, of their intention to build a house and a bridge in the town, can in nowise be said to form the consideration of the note. Nor did the evidence offered amount to a fraud, because the defendant did not also offer to prove, that when the proprietors made the declarations of their intention to build in the town, they did it deceitfully. It does not appear from anything the defendant offered to prove, but that the proprietors made the declarations in good faith. Fraud cannot exist without an intention to deceive. As the evidence offered did not tend to prove either failure of consideration or fraud, it was properly overruled.

*Judgment affirmed.**Linder and Greathouse, for appellant.**Stephen A. Douglas, for appellee.*

MILLER v. HONCKE.

1 Scam. R., 501.

Error to Macoupin.

WHERE the bill of exceptions does not affirmatively show that a question propounded to a witness was illegal, the Supreme Court will affirm the judgment.

*Judgment affirmed.**Linder and Greathouse, for plaintiff.**Stephen A. Douglas, for defendants.*

WILLIAMS v. CLAYTOR.

1 Scam. R., 502.

Appeal from Adams.

1. At common law the agent of a county could not convey the real estate of the county.
2. Under the act of January 7, 1835, power was conferred upon the County Commissioners to make such conveyances, and prior conveyances made by them were declared valid. (a)

Williams v. Claytor.

8. In an action of ejectment, the plaintiff to support his title, read in evidence a deed from one Wheelock and wife, to one Claytor, from whom the lessors of the plaintiff derived title to the premises described in his declaration, and the defendant read in evidence a decree of the Adams Circuit Court sitting as a court of chancery, made in a case wherein Archibald Williams, administrator, etc., was complainant, which rescinded and set aside the deed to said Claytor, and the deed to the lessors of the plaintiff, and directed that a special execution issue to the sheriff of Adams county, against said Wheelock, as the trustee of one Hynes, to sell the premises described in the plaintiff's declaration, for the satisfaction of the judgment and costs in favor of said Williams, administrator, mentioned in the bill in chancery, upon which the decree was rendered, and offered to read in evidence the special writ of execution with the return thereon, which return stated that said premises were sold to the defendant, and also the sheriff's certificate of the sale of said premises, and his deed to the defendant, under an execution in favor of one Wesley Williams, which were excluded from the jury; and the plaintiff then offered to prove that Claytor had redeemed said premises from said sheriff's sale, which was not allowed, and the court excluded said decree from the jury. The defendant then offered in evidence the bill, process, etc., in the chancery suit in which the decree was rendered in favor of Archibald Williams, administrator, etc., which were rejected by the court, to all of which decisions against him, the defendant excepted. *Held*, that the decree was properly excluded from the jury, inasmuch as the defendant had failed to produce a deed from the sheriff under the special writ of execution. *Held*, also, that the bill was properly excluded. *Held*, also, that the deed from the sheriff, was not admissible in evidence, as it recited an entirely different writ of execution from that described in the decree. *Held*, also, that there was no error in the proceedings.
4. Where a link in the necessary chain of evidence is wanting, instead of consulting the plaintiff compulsorily the defendant may move to exclude all of the evidence from the jury.

SMITH, J.—This was an action of *ejectment* to recover the south half of Lot No. 3, in Block No. 5, in the town of Quincy. The declaration contained two demises—one from George Claytor, and one from Mason C. Fitch, Harvey Scribner, and Henry Renckin.

The plaintiff in the Circuit Court, during the progress of the trial, offered to give in evidence a patent from the United States, for the land on which the half lot in question is laid out, to the county of Adams; next, a deed from the county commissioners of Adams county, for the same lot, to E. L. R. Wheelock, assignee of Jeremiah Rose, duly acknowledged and recorded; next, a deed from Wheelock and his wife, duly executed and recorded, to George Claytor; and from Claytor and his wife to Fitch, Scribner, and Renckin, the lessors of the plaintiff, which was objected to by the defendant, but the deeds and patent were admitted as evidence. The possession of the premises by Williams, at the commencement of the suit, was also proven.

The defendant, on the trial, offered in evidence a decree obtained in a suit in chancery in the Circuit Court of Adams county, in November, 1834, in which Archibald Williams, administrator of one Broady, deceased, was complainant, and Peter Hynes, E. L. R. Wheelock, George Claytor, R. G. Ormsby, Mason C. Fitch, Harvey Scribner, and Henry Renckin were defendants, by which, among other things, the conveyance from Wheelock to Claytor, and from Claytor to Fitch, Scribner, and Renckin, for the half lot described in the plaintiff's declaration, were declared fraudulent and void, and were set aside, and rescinded, and cancelled, and the premises decreed to be sold under a special execution against Wheelock, as the trustee

of one Peter Hynes, to satisfy the judgment in the complainant's bill of complaint set forth. The defendant then offered to produce in evidence, the special execution for the sale of the Lot 3, in Block 5, named in the decree in the cause in chancery, with the indorsements and certificate of the sheriff of the county of Adams, that the lot in question had been duly sold to the defendant, Williams, and that he would be entitled to a deed after the period for redemption had expired; and, also, a deed for the premises, executed by the said sheriff, by virtue of a writ of *fiery facias*, issued on the 6th day of October, 1832, on a judgment obtained by one Wesley Williams, against one Peter Hynes, for the sum of sixty-two dollars and sixty-two cents, to Robert R. Williams, the defendant, duly acknowledged, and certified, reciting that the period of redemption had expired. This evidence the Circuit Court excluded.

The plaintiff then moved to exclude the decree from the jury, which had been previously offered and read in evidence, which was done. The defendant here closed his evidence, but subsequently applied to the court to admit in evidence a bill in chancery, filed in the Circuit Court in Adams county, on the 22d November, 1833, by Archibald Williams against said Wheelock and others, being the bill on which the decree, which had been excluded from the jury, was founded. The Circuit Court rejected the bill, and the cause being submitted to the jury, a verdict was rendered against the defendant, with nominal damages. To reverse the judgment on this verdict, a writ of error has been prosecuted, and it is now assigned for error—

1. That the court erred in allowing the deeds offered by the lessors of the plaintiff to be read in evidence.

2. In excluding the decree from the jury, and not permitting the deed made to the defendant by the sheriff, under the execution against Hynes, in favor of Williams, to be read in evidence.

3. In not admitting the bill in chancery to be read in evidence.

In considering the grounds relied on as errors in this cause, the only question which we conceive can arise out of the facts adduced in evidence on the part of the lessors of the plaintiff, is as to the mode of execution, and character of the deed from the county commissioners of Adams County to Wheelock.

There can be no doubt, that at the time of the execution of the deed to Wheelock, the commissioners could not legally convey the real estate of which the county of Adams was possessed; and had not the "*Act concerning conveyances by County Commissioners*," approved 7th of January, 1835, been passed, the deed would have been void and inoperative.

This act has declared that such conveyances, made in good faith, before the passage of the act, shall be valid and as operative as if the commissioners had been duly authorized to execute them, at the time of the execution of the same. It has further provided for the execution of deeds for the conveyance of real estate owned by counties, for the future. The character of the deed is, perhaps, more equivocal, and admits of some doubt as to its force and effect, because the commissioners are named as the grantors in the deed, personally, though described as commissioners. The patent from the United States, conveys the land to the county of Adams, by such name, and it is necessarily thereby vested in such name. It would certainly have been more regular, and appropriate, to have made the county of Adams the grantor in the deed to Wheelock, and not the county commissioners by their names, although they are described as such commissioners in the deed.

The act declaring that the conveyances heretofore executed by the commissioners, shall be valid, might be supposed to be confined to the signing of the deeds of conveyance. Yet, when the object and spirit of the law is considered, it will be recollected, that it was the intention of its framers to confirm and render valid all such defective conveyances, whether for want of power to execute them, or on account of the character of the deeds, and the modes of execution.

In the case before us, the deed, also, recites that the conveyance is made for and on behalf of the county; and we are, therefore, when the causes which doubtless produced the act, are considered, led to the conclusion that the deed is sufficient to convey the title to the estate granted. The Circuit Court, we conceive, decided, in effect, if not in mode, correctly, in excluding the decree from the jury, after the defendant had failed to produce a deed in conformity to the sale made under the special writ of *feri facias*. It will be perceived that the deed recites a sale on an execution made in an entirely different cause, between different parties, in an action at law, and therefore there could be no relevancy between a title acquired under the *feri facias* set out in the deed, and the one offered in evidence under the decree. The point can admit of no doubt. The objection, that, as the decree was evidence conducive to prove the issue, it should have been left to the jury to act on, is inconclusive. The practice of excluding evidence, after it has been received, where some one important link in the chain, necessary to establish the right claimed, is wanting, seems to have been adopted in many of the courts of the western States as an equivalent for instructing the jury, that for want of such proof, the party has not made out the point sought to be established, and that,

Williams v. Claytor.

Pearson v. Bailey.

therefore, they must disregard the other portions of evidence with reference to that point, and consider it not proven, which latter mode is preferable, being more consistent with the regular mode of proceeding. But the fact that this course was not taken, as the result, had it been, would have been the same, cannot be a sufficient reason for disturbing the judgment. The defendant has suffered no injury from the course adopted.

The exclusion of the bill in chancery was correct. It related directly to the excluded decree, and was the bill on which that decree was founded.

The minor causes referred to, of defects in the declaration and verdict, have not been considered objectionable. They are entirely cured by the statute of jeofails.

Judgment affirmed.

A. Williams, Logan and E. D. Baker, for appellant.

Browning and Ralston, for appellee.

(a) A petition for a rehearing was denied in this cause. *Vide Cooke's Stat.*, 299, sec. 15.



PEARSON v. BAILEY.

1 Scam. R., 507.

Appeal from the Municipal Court of Chicago.

1. A COUNTY surveyor is entitled to twenty-five cents and no more, for each lot he lays out, surveys and plats in a town.

2. Where by statute an office is created and the duties of the officer are specifically defined and fees attached for his official service, and a subsequent statute imposes an additional duty of the same character, but less onerous, and establishes a less rate of compensation—the later statute will be regarded, although statutes in *pari materia* are ordinarily construed together.

3. When the transcript shows what judgment the inferior court ought to have rendered, the Supreme Court will not remand the cause, though the judgment was erroneous, but will enter such judgment as ought to have been given.

Judgment modified.

Grant, for appellants.

Scammon, for appellee.

SCHOONER CONSTITUTION v. WOODWORTH.

1 Scam. R., 511.

Appeal from Municipal Court of Chicago.

1. Appeals are unknown to the common law.
2. Statutes giving the right of appeal with a view to a trial *de novo* in the appellate court, must be construed strictly.
3. No appeal lies in a proceeding *in rem* unless the owner or others interested in the thing makes himself a party to the suit by interpleader, appearance, or in some other known mode.
4. A general statute giving an appeal in certain causes, will not ordinarily be extended to extraordinary actions authorized by special statutes.
5. This was an attachment under the vessel statute recognizing liens *in rem*.

LOCKWOOD, J.—This was an attachment issued by a justice of the peace, in favor of Woodworth, against the schooner Constitution, for the services of Woodworth on board the schooner. On the trial before the justice of the peace, a judgment was given in favor of the plaintiff, against the schooner, for \$49 50. Subsequently to the judgment, Gurdon S. Hubbard and Henry G. Hubbard, for and in behalf of the schooner, filed an appeal bond in the office of the clerk of the Municipal Court of the city of Chicago, and the cause was docketed in said court for trial. On the hearing of the cause in the Municipal Court, that court, on motion of Woodworth, dismissed the suit from the docket, and gave judgment for costs in favor of the plaintiff below, against the defendant. To reverse this judgment, an appeal has been brought to this court by Gurdon S. and Henry G. Hubbard, for and in behalf of said schooner, and the only error assigned is, that the court erred in dismissing the appeal.

The attachment issued by the justice was in pursuance of "*An Act authorizing the seizure of boats and other vessels by attachment in certain cases,*" passed 13th February, 1833. The proceedings before the justice were regular, and the only question we are called upon to decide, is whether an appeal lies from the decision of the justice in this case. The act expressly gives a justice of the peace jurisdiction to issue an attachment, but is silent on the subject of appeals, or any other mode of reviewing the decision of the justice. Appeals for the removal of causes from an inferior to a superior court, for the purpose of obtaining trials *de novo*, are unknown to the common law, and can only be prosecuted where they are expressly given by statute. It was contended on the argument, that the right to appeal was found in the 30th section of the "*Act concerning Justices of the Peace and Constables,*" passed 3d February, 1827. But admitting that the authority to take an appeal under this section extends to proceedings and judgments had before justices of the peace under other statutes, on which point we give no opinion, still, in order to entitle a party to take an

Schooner Constitution v. Woodwóth.

King v. Dale.

appeal under that act, the appellant must execute a bond with security to the opposite party. The attachment and judgment is against the schooner, consequently this requisition of the act, cannot, in a case so situated, be complied with. If the Hubbards were either owners or consignees of the vessel, they should have made themselves defendants under the 5th section of the act authorizing the justice to issue the attachment. They would then have been parties to the suit, and in a situation to take an appeal, if an appeal is allowed by law. The appeal being irregularly taken, was correctly dismissed by the court.

Judgment affirmed.

Grant and Peyton, for appellant.

Davis and Forman, for appellee.

KING v. DALE.

1 Scam. R., 513.

Appeal from Hamilton.

1. *Case for Crim. Con.*
2. No error can be assigned in an appellate court which is contradictory of the record.
3. Where a criminal prosecution and civil action originates in a single transaction, the simple fact that a jurymen has formed and expressed an opinion in the criminal cause, is no objection to his competency in the civil suit, if he states expressly or by implication that he is indifferent between the parties.
4. No intendments will be indulged in to overthrow a verdict, on account of the supposed incompetency of one of the jurors.
5. In a case of *crim. con.* a marriage in fact must be proved.
6. Where a marriage is solemnized in a sister State, and the question arises as to its validity in Illinois, an exemplified copy of the license to marry, and an indorsement on the back thereof, of the marriage by the officer or minister who solemnized the *rite*, with an authentication of the license and return by the custodian of the record of marriage licenses—the evidence is sufficient to prove the relationship of the parties.
7. Under our statute if an attorney in a cause writes or dictates the answer of a witness, whose deposition is taken, the deposition is illegal; but the fact must be proved, or the appellate court will not presume that the proceeding was irregular.
8. Where an immaterial deposition is admitted, even when irregularly taken, this is no error which an appellate court will regard.

WILSON, C. J.—This was an action for *crim. con.* Dale, the plaintiff below, obtained a verdict and judgment against the defendant, King, from which he appealed to this court, and assigned for error,

1. That the court permitted an individual to be sworn as a juror, who had formed and expressed an opinion as to the merits of the case.

2. That the court permitted to be read in evidence, a certificate of the marriage in Tennessee, between Dale and his wife, without its being properly authenticated, and,

3. That the court allowed depositions to be read in evidence, which were objected to.

One of the facts assumed in the first assignment of error is contradicted by the record. Hardy, the individual objected to as a juror, was not sworn upon the jury, but the objection to him was overruled by the court, after he had been sworn and interrogated as to his having formed and expressed an opinion upon the merits of the case. In his examination on that point, he stated "That he had heard the testimony against Cinthia Dale, who was indicted for adultery with the defendant, King, and from that testimony he had formed and expressed an opinion; but had not formed any opinion in this case, not knowing that there was a civil suit then." This statement is very indefinite as to the connection between the cause in which the proposed juror had formed an opinion, and the one before the court; and it does not appear with any degree of certainty, that the criminal intercourse between Mrs. Dale and King, which was the foundation of the criminal prosecution against her, did not take place subsequently to the institution of the suit then before the court. If such was the fact, (and nothing to the contrary is shown,) then there was no objection to the individual as a juror, because the plaintiff's right to recover, depended upon the proof of circumstances anterior to those which may have been the foundation of the proposed juror's opinion.

The second assignment of error, which questions the sufficiency of the authentication of the certificate of marriage, is not supported by the facts in the case. An inspection of the record will show it to contain an exemplified copy of a license issued in the State of Tennessee, for the marriage of John Dale to Cinthia Smith. On the back of this license is indorsed a certificate of a justice of the peace, that he had solemnized the marriage. The official character of the officer granting the marriage license, and also that of the one performing the ceremony, is authenticated by the certificate of the clerk, the keeper of the records, under his seal of office. The presiding justice then certifies to the authority and official character of the clerk, whose attestation, in turn, verifies that of the justice. These several authentications are by the accredited officers of the law, and in the form and order prescribed by the act of Congress, to entitle records and public acts to the same faith and credit in the court of the several States, that they have by law in the courts of the State from whence they are taken. The certificate of marriage was therefore properly received in evidence.

The third assignment of error applies only to the depositions of Freeman and Vaught. The reading in evidence of Vaught's deposition was objected to on the ground that it was in the handwriting of

King v. Dale.

Holliday v Swailes.

McClermand, one of the attorneys for the plaintiff. It is certainly a valid objection to a deposition, that it has been dictated or drawn by an attorney in the cause; but the objection must be supported by proof of the fact. This was not done in this case. There is no evidence whatever, that the deposition was written by McClermand, nor is it even satisfactorily proved that he was an attorney in the cause. All the testimony in relation to that point, is, that Scates, the attorney who conducted the cause for the plaintiff, told McClermand that he wished him to assist him in the suit; but it does not appear that he consented to do so, or that he ever did appear in the case as attorney, or in any other capacity.

With respect to Freeman's deposition, it is unnecessary to inquire into the sufficiency of the objections to its being received in evidence, because it proves nothing for or against either party, and could not therefore have influenced the decision of the jury; for this reason, its having been read in evidence cannot be assigned for error.

Judgment affirmed.



HOLLIDAY v. SWAILES.

1 Scam. R., 515.

Appeal from Morgan.

1. A case under the "inclosure act." (a)
2. Notice and an opportunity to defend, is the fundamental principle of judicial proceedings under our constitution and laws.
3. Where a statute is silent as to the giving of a notice, it is necessarily implied, and cannot be dispensed with.
4. Under the "inclosure act," where contribution is demanded for the erection of a partition fence between adjoining proprietors, notice of the application for judgment is an indispensable prerequisite to the validity of the proceeding.
5. An appeal lies from the judgment of two justices under the "inclosure act."
6. In special proceedings, where the record is silent as to the giving of notice, no presumptions will be indulged in to support the regularity of the proceedings.

WILSON, C. J.—The record shows this to have been a proceeding under the "*Act regulating Inclosures*," and that upon the application of Swailes to two justices, they rendered a judgment in his favor against Holliday for \$58 80, being a moiety of the estimated cost of a division fence. From this judgment Holliday appealed to the Circuit Court, and moved the court to reverse the judgment upon the ground that he had not appeared before the justices, or been notified to do so, which also appears from the record. The court overruled this motion, and, upon the application of Swailes, dismissed the appeal. In support of this decision, it is argued, that inasmuch as the act authorizing this proceeding, does not require the defendant to be notified, nor pro-

Holliday v. Swailes.

Elliot v. Sneed.

vide for an appeal from the justices' judgment, that therefore no notice is necessary, and that the judgment is final. The correctness of this inference cannot be admitted. If it is even conceded that the act conferring general jurisdiction on justices, which requires "all suits before them to be commenced by summons," is to be construed to apply only to cases arising under that act, it was nevertheless necessary that the justices should have notified the defendant of the prosecution against him. It would be a violation of one of the first principles of justice and of judicial proceedings, to try and decide upon the rights of an individual either civilly or criminally, without notice; and consequently without affording him an opportunity of defending himself. The question of appeal is settled by the act allowing appeals in certain cases. That act authorizes appeals in *qui tam*, and other actions for forfeitures and penalties. This case is of the latter denomination. The warrant against Holliday was for a claim in the nature of a penalty charged to have been incurred by him in neglecting to make and keep in repair a division fence between him and the plaintiff agreeably to the act regulating inclosures.

Judgment reversed.

Wm. Thomas, for appellant.

McConnel, for appellee.

(a) Vide Cooke's Stat., 590.

ELLIOT v. SNEED.

1 Scam. R., 517.

Appeal from Clay.

1. A CONSTABLE is protected in executing a judgment, where the justice of the peace, before whom the judgment was obtained had jurisdiction of the subject matter and person of the defendant.

2. If a constable collects money under a proceeding in attachment, which is consummated by judgment, and the award of an execution, an order for the reversal of the judgment on appeal will not render him liable in an action for money had and received at the suit of the attachment debtor.

3. Where a judgment is assigned, the execution should nevertheless be issued in the name of the original plaintiff.

4. A payment to the assignee of a judgment is regular.

5. An assignee of a judgment is not liable in an action for money had and received where the judgment is reversed on appeal, after the money is collected and paid over to him by a constable.

Elliot v. Sneed.

Sheldon v. Reihle.

6. If any one is liable under the above indicated circumstances it is the plaintiff in attachment.

7. The facts in this cause are terribly complicated, but may be simplified thus: 1. A sued B before C, a justice of the peace, and recovered a judgment. 2. C, the justice, being indebted to B, entered satisfaction of the judgment. 3. A, by mandamus, compelled C to issue an execution without reference to the apparent satisfaction. 4. D, a constable, collected the money upon this execution. 5. C, the justice, under pretence of being a creditor of A, sued the latter by attachment, garnisheed D, and recovered a judgment. 6. C then assigned this judgment to B. 7. B caused an execution to issue upon this judgment, and placed the same in the hands of E, a constable, and E collected the money of D, the first constable, and garnishee. 8. E then paid the money thus collected of D to F, an assignee of B. 9. A then sued out a writ of *certiorari* and reversed the judgment rendered against him and D in the attachment cause. 10. A then sued D and recovered the money he was entitled to upon his original judgment v. B. 11. D then sued E and recovered back the money he had paid under the garnishee process in the attachment suit v. A; and 12. E sued B and recovered the money he had been thus compelled to pay on the account of the latter. *Held*, that the judgment was erroneous and must be reversed—the action should have been against C, the justice.

Judgment reversed.

Ficklin, for appellant.

French, for appellee.

NOTE.—1. If any court, lawyer, or suitor, desires any more information in this case, the abridger respectfully suggests that they shall examine the record *and* original report.

2. When the mandamus vacated the satisfaction of B's judgment, the justice having received no actual benefit, was not liable in law, and E having compulsorily paid a debt for which B alone was liable, the privity of contract, if any at all existed, was between the parties to this cause.

SHELDON v. REIHLE.

1 SCAM. R., 519.

Error to Madison.

1. Trial of the right of property.

2. A motion for the dismissal of an appeal in such a cause, rests in the discretion of the Circuit Court and a decision thereon cannot be assigned for error.

3. An appeal bond under this statute may be executed by an attorney in fact.

Sheldon v. Reihle.

Illinois and Michigan Canal v. Calhoun.

4. The Supreme Court will presume the authority of an attorney in fact, who signs a bond in the name of the appellant, on an appeal, where the record is silent upon the point.

5. Where on the trial of the right of property the contest arises between a stranger and attaching creditor the writ of attachment and return thereon is admissible in evidence.

6. A verdict "that the title to the property seized was in the attachment debtor," at the time of the seizure is sufficiently formal.

Judgment affirmed.

J. B. Thomas and Prickett, for plaintiff.

W. Thomas, for defendants.



ILLINOIS AND MICHIGAN CANAL v. CALHOUN.

1 Scam. R., 521.

Error to Cook.

1. At a public sale of canal lands, the commissioners possess no power to impose any other conditions upon bidders, than those specifically enumerated in the statute.
2. Where the commissioners sue a bidder, at a public sale of canal lands, to recover the purchase money bid, they must aver that the sale was *public*, and the defendant the highest bidder.

SMITH, J.—The question presented for consideration in this case, involves the regular execution of the powers of the Board of Canal Commissioners, relative to the sale of lots in the town of Chicago. The declaration of the plaintiffs contains five counts, each of which was demurred to separately. The first and third set forth a public sale of a lot in the town of Chicago, to the defendant, for \$20,000 as the highest bidder, at the sale made by an auctioneer, as the agent of the Board.

That at that sale a special notice of the terms of sale was read, which among other things declared, "That in case any bidder shall fail to comply with the terms of sale, during the days of sale, on which the sale of the lot is made, his bid will be forfeited, and the lot resold,—the first purchaser being held accountable to the commissioners for any loss that may accrue from the sale; but entitled to no profit therefrom." The plaintiffs aver a refusal by the defendant to complete the purchase, and make payment of the amount required to be paid, according to the terms of the sale; and that in pursuance of the conditions annexed to the sale, and in consequence of such refusal, they resold the lot at a subsequent public sale, for a much less sum than the amount bid by the defendant. To recover this difference, the present action is brought. The second, fourth, and fifth counts are for a sale by the plaintiffs, and an agreement by the defendant, to purchase and

take the lot, without reference to the special conditions, and do not aver that the sale was a public one. The Circuit Court sustained each of the demurrers; and this is the cause of error now assigned.

To understand correctly the decision of the Circuit Court, it will be necessary to examine the act creating the Board of Canal Commissioners, and more particularly such portions of it as prescribe their duties with reference to the disposition of the lots of which the one in question formed a part; and, also, an act of Congress in connection therewith. By the 33d section of the "*Act for the construction of the Illinois and Michigan Canal*," approved 9th January, 1836, it is provided, that the commissioners shall, on the twentieth day of June then next, proceed to sell the lots in the town of Chicago, as in their judgment will best promote the interest of the canal fund; and before making such sale, public notice shall be given thereof in five newspapers, at least eight weeks prior to any sale. It is further provided, that if no sale be made on the day named, such sale may be made at any time thereafter, on giving a similar notice, and upon the terms in the act specified.

The 34th section provides for the affixing a value to each lot, and forbids its being sold for less than such value; and that all lots not sold on the day of offering, shall be again advertised for sale; and shall continue to be advertised for sale, until the whole are sold. It further declares, that no lot shall be sold otherwise than at public sale, to the highest bidder. The 36th section declares, that "In all sales of canal lots, the secretary and treasurer of the board, shall act as register and receiver; and shall be governed by the same rules that now govern registers and receivers in the United States' land offices in this State, except as in the act is provided." The act of Congress of the 24th April, 1820, section 2d, provides, that "If any person, being the highest bidder at public sale for a tract of land, shall fail to make payment therefor, on the day on which it was purchased, it shall be again offered at public sale on the next day of sale, and such person shall not be the purchaser of that or any other tract offered at such sale."

By the provisions of the act referred to, creating the Canal Board, it will be obvious that the commissioners were not authorized to annex to the conditions of the sale, the terms imposed by the notice given. The 2d section of the act of Congress, having been the mode adopted by the 36th section of the act quoted, for the government of the sales, they were not at liberty to impose others, or substitute those that would impose conditions of the character described. The refusal by the purchaser to pay for the lot in the manner provided by

law, on the day of sale, required them to put up the lot again for a re-sale, and to prohibit such purchaser refusing to pay for the lot previously purchased, from being a bidder for any other lot on the day of sale.

It will be perceived that unless this rule was adopted, under the provisions of the section of the act of Congress referred to, there was no power whatever vested in the commissioners, to sell the lot on a subsequent day, without considering it as an unsold lot; and again advertising it, as in the case of the original offering of lots for sale.

The 33d section of the act creating the board, declaring that the sale of lots should be made on the 20th day of June, and not providing for a continuance of the sales from day to day, would not have authorized the sales from day to day, unless another portion of the act of Congress, providing for the sales of the public lands, be also adopted, which authorizes the continuance for two weeks. The acts of Congress relative to the duties of the registers and receivers, in regard to the sales of the public lands, having been made applicable to the sales by the Board of Commissioners, it was probably considered unnecessary to declare that the sales might be continued for a specified length of time. If this reasoning be correct, it follows as a consequence, that by the adoption of the penalty of forfeiture of the bid of the delinquent purchaser, and the prohibition to become a purchaser of any other lot at the sales, are the only terms which the commissioners could legally impose and enforce. They had no discretion to exercise any other powers than such as are conferred by the act; and those adopted are not among those granted. The law has specially prescribed the extent and character of the consequences which should result from a failure to make payment for the lot purchased; and thus necessarily inhibited the substitution of others. The demurrer was therefore correctly sustained.

The second, fourth, and fifth counts are radically defective in not averring that the sale and purchase of the lot were at a public sale, agreeably to the provisions of the law, prescribing the mode; and that the defendant was the highest bidder therefor. The counts only show a private sale, and that is expressly prohibited by law. As there was no plea of the statute of frauds, the question whether the sale was only a parol one, and not, therefore, binding, cannot arise in this case.

Judgment affirmed.

Grant, for plaintiff.

Ford, for defendant.

Wallace v. Jerome.

Covell v. Marks.

Mitchell v. State Bank of Illinois.

WALLACE v. JEROME.

1 SCAM. R., 524.

Error to Will.

1. THE decision of the Circuit Court upon a motion to set aside a default is discretionary, and cannot be assigned for error.

2. The act of July 21, 1837, does not embrace motions to set aside a default.

*Judgment affirmed.**Beaumont, Skinner and Spring, for plaintiff.**Butterfield, for defendant.*

COVELL v. MARKS.

1 SCAM. R., 525.

Appeal from McLean.

WHERE the plaintiff amends his declaration upon a note by adding the words—descriptive thereof—“with 12 per cent. interest from date until paid;” this is a substantial amendment, and entitles the defendant to a continuance.

*Judgment reversed.**Stephen A. Douglas, for plaintiffs.**Davis and Forman, for defendant.*

MITCHELL v. STATE BANK OF ILLINOIS.

1 SCAM. R., 526.

Appeal from Hamilton.

1. A judgment imports absolute verity.
2. A judgment cannot be impeached collaterally.
3. Where the State Bank receives promissory notes in consideration of illegal paper issued by it, and reversed judgments thereon, and after the rendition of the judgments, the Supreme Court of the United States decided that the issues of the bank which constituted the consideration of the notes, were “*bills of credit*,” and therefore illegal, and the debtor of the bank, without a knowledge of the decision, gave new notes to the bank, in satisfaction of the judgment, the court held that no defence existed to an action upon the last mentioned notes.
4. A judgment based upon an illegal note is a valid consideration for a new promise to pay the debt.
5. A judgment is binding until reversed, and conclusive upon parties and privies.
6. An objection to the constitutionality of a law must be made at the earliest opportunity, before legal or equitable rights have become vested under it.

THE facts were that a suit was instituted by the appellees v. the appellants upon this note.

“On or before the first day of January next, we or either of us promise to pay the president and directors of the State Bank of Illinois, the sum of eighty-six dollars and ten cents, for value received, being the amount due on two judgments in favor of the bank against N. Janny and others, on Lockwood’s docket, and one judgment against Ichabod Mitchell, in the Circuit Court, on a note given by said Janny, together with interest on the above sum from the 24th of August, 1829, till paid: provided if this note shall be paid punctually, the above interest and ten per cent. of the principal to be remitted, if both do not exceed twenty-four per cent. on the whole.

“Witness our hands and seals, this 19th day of September, 1833.

GEORGE MAYBERRY, [L.S.]

ICHABOD MITCHELL. [L.S.]”

The bill of exceptions was in these words: “Be it remembered, that on the trial of this cause, the defendants, by their attorney, offered to produce in evidence to the court, the two several judgments referred to in the note on which this suit was brought, and also the several notes on which those two judgments were rendered; and to prove that said two last-mentioned notes were executed to the said plaintiffs for and in respect of bills of credit issued by the State of Illinois, by means of the machinery of what was called a State bank, created in and by the act of the year 1821, entitled “*An act to establish*,” etc.; and that bills of credit issued by the authority of said State in violation of the Constitution of the United States, formed the whole consideration of the said last-mentioned notes: which evidence except said judgments, the court refused to hear, and to allow to be produced; to which opinion of the court in overruling this evidence, the defendants, by their counsel, except, and pray this their bill of exceptions may be sealed and allowed, etc.

SMITH, J.—The appellants, being the sureties of other persons, were sued on certain notes which they had signed with their principal, against whom judgments had been rendered. To obtain time for payment, and to liquidate these judgments, the plaintiffs gave other notes in extinguishment of the judgments; and in the Circuit Court they attempted to show that the notes on which the judgments had been rendered were void—having been given for notes of the State Bank, the notes of the bank being bills of credit issued contrary to the provisions of the Constitution of the United States. The decision of the Circuit Court, in refusing to admit the testimony offered, was correct.

The judgments were a good and valid consideration for the notes. The original notes were extinguished by the judgments; and the debt

Mitchell v. State Bank of Illinois.

Lee v. Bates.

Miller v. Bledsoe.

of record created by the judgments, were, until reversed, a sufficient and legal consideration. Until their reversal, they were, of course, binding; and the consideration upon which they were rendered, could not be inquired into collaterally. It was not, in this action, competent for the court to admit evidence to impeach the judgments, because they implied verity in themselves, and could not be contradicted; and being the consideration upon which the note now sued was founded, the decision of the Circuit Court in excluding the evidence offered, was justified by the well settled principles of law applicable to evidence.

Judgment affirmed.

Eddy, for appellants.

Olney, attorney-general, for appellees.



LEE v. BATES.

1 Scam. R., 528.

Appeal from Fayette.

1. A DEFENDANT is entitled to a continuance, where a *material* witness is absent, and he has used due diligence to obtain his presence or take his deposition, or where it is apparent from the facts that the defendant could not, by the use of ordinary diligence, procure his testimony.

2. Where a declaration is filed only 12 days prior to the term of the court, and the witness of the defendant resides in a sister State, and the evidence of that witness is material—the defendant is entitled to a continuance.

Judgment reversed.

Field, for appellants.

Davis and *Forman*, for appellee.



MILLER v. BLEDSOE.

1 Scam. R., 530.

Error to Municipal Court of Alton.

1. Under our statute making promissory notes assignable, the payees, or either of them, cannot assign a moiety or any other portion of the money due thereby to a stranger so as to authorize the latter to sue the maker at law.
2. Where A gives a note to B and C, and B assigns (by indorsement on the back of the note) his interest to C, a suit in the name of B and C, for the use of C, is legal.

LOCKWOOD, J.—This was an action of *assumpsit* brought in the court

Miller v. Bledsoe.

below, by Bledsoe and Turpin against Miller, on a promissory note. On the trial of the cause, the plaintiff below produced and offered to read a note in evidence to the jury, in the following words, to wit:

“LOWER ALTON, ILL., *April* 18, 1836.

“Two years after date, I promise to pay to the order of M. O. Bledsoe and B. F. Turpin, two hundred and eighty dollars, value received, negotiable and payable at the Branch of the Illinois State Bank at Alton.

“ANDREW MILLER.”

Upon the back of which note, there is in writing the following indorsement:

“I assign my interest in the within, to M. O. Bledsoe, without recourse in any event.

“B. F. TURPIN.”

A witness was sworn, who testified that the signature to said indorsement was in the handwriting of B. F. Turpin, one of the plaintiffs. To the reading of which note in evidence, the defendant objected, but the court overruled the objection and admitted the note. Other testimony was offered by the defendant, and rejected, but it is unnecessary to state it, as it only tended to prove the fact, which was sufficiently established, that Turpin had parted with his interest in the note, to Bledsoe.

It is only necessary for this court to decide whether the note was admissible in evidence. At law, a moiety, or any other portion of a promissory note, cannot be so assigned as to enable the assignee to bring an action in his own name, for his portion of the note. Had Turpin assigned his half of the note to a third person, that third person could not have united with Bledsoe, in bringing the action, for they would have to sue in different capacities, Bledsoe as payee, and the third person as indorsee. The same result would follow, if Bledsoe had brought the action in his own name; he would have had to declare for a moiety of the note as payee, and for the remainder as indorsee. This would lead to much confusion and complexity in pleading. In order, therefore, to enable an indorsee of a note to bring an action in his own name as indorsee, the whole interest in the note must be assigned to him. The interests of an assignee of part of a note, would doubtless be protected in a court of law, but the action must be brought in the name of the payee or payees, who continue to be the legal holders of the note for the purpose of collection. The indorsement on the note, can only be regarded as a private memorandum between the payees, and only vested in Bledsoe an equitable title to the money when collected. The court consequently decided cor-

Miller v. Bledsoe.

Johnson v. Moulton.

rectly in receiving the note in evidence, and in rejecting the parol evidence.

Judgment affirmed.

Cowles and Krum, for plaintiff.

Bullock and Keating, for defendants.

JOHNSON v. MOULTON.

1 Scam. R., 532.

Appeal from Warren.

1. It is the province of a jury to determine the weight of evidence, and the court will not disturb their verdict unless they are flagrantly wrong.
2. Where a witness swears that he carried a message relating to the cause of controversy, from the defendant to the plaintiff, the reply of the latter is advisable in cross-examining the witness.
8. Under the act of Feb. 18, 1881, a settler may recover upon an express promise to pay him for his improvements made upon the public lands, and he need not show a fixed sum to be paid by the promissor, but may recover upon a *quantum meruit*.

LOCKWOOD, J.—This action was originally commenced before a justice of the peace, by Moulton against Johnson, and brought into the Circuit Court of Warren county by appeal. The cause was tried by a jury in the Circuit Court, and a verdict and judgment given in favor of Moulton. The errors assigned are, 1st, The judgment in the Circuit Court was given against the weight of testimony. 2d, The court erred in permitting the conversation of the plaintiff below to be received in evidence. And, 3d, The court instructed the jury that they must find for the plaintiff, if they believed that a contract, either express or implied, was entered into between the parties, in relation to the improvements upon the land referred to in the record. In relation to the first error assigned, it is a well settled rule of law in trials by jury, that the weight of testimony is a question to be decided by the jury exclusively. The decision, consequently, cannot be assigned for error. Had there been an application to the court below for a new trial on this ground, the case ought to have been a flagrant one, to have justified the court in disturbing the verdict. In reference to the second error, the bill of exceptions discloses the following state of facts: Johnson called a witness and asked him if he had delivered a message to Moulton, in relation to the controversy between them; and upon the question being answered in the affirmative by the witness, with a statement of the nature of the communication sent by the defendant to the plaintiff, the latter asked the witness "What was his reply?" The answer to this question is the conversation referred to in the assignment.

Johnson v. Moulton.

McKinney v. May.

When the defendant gave in evidence a message from himself to the plaintiff, having relation to the merits of the dispute between them, if the plaintiff had remained silent, an inference might have been drawn by the jury, that the plaintiff acquiesced. The answer of the plaintiff was therefore relevant, to rebut any such presumption, and was therefore correctly received in evidence for this purpose. The third error assigned does not correctly state the charge of the judge. The charge was, that if the jury believed there was a promise to pay for the improvements, although there was no express contract as to the amount to be paid, that the law raised an implied agreement to pay their worth or value. The "*Act to provide for the collection of demands growing out of contracts for sales of improvements on public lands,*" passed February 13th, 1831, makes all contracts, promises, or undertakings, for the sale, purchase, or payment of improvements made on the public lands, valid in law or equity, and they may be sued for and recovered, as in other contracts. In order to sustain an action under this act, all that is necessary for the plaintiff to prove is, that the defendant promised expressly to pay for the improvements. If the price to be paid be not agreed on, the contract is binding, and the value of the improvements must be ascertained by proof. The law in such cases raises an implied *assumpsit* to pay the worth or value of the property sold. The charge of the court was consequently correct.

*Judgment affirmed.**Davis* and *Forman*, for appellants.*Browning*, for appellee.

MCKINNEY v. MAY.

1 Scam. R., 534.

Appeal from Morgan.

A JUDGMENT by default is erroneous, where a demurrer of the defendant to the declaration or petition is on file, and undisposed of.

*Judgment reversed.**McConnel*, for appellant.*E. D. Baker*, for appellee.

Dazey v. Orr.

Ayres v. Lusk.

DAZEY v. ORR.

1 Scam. R., 535.

Error to Adams.

Notice of a motion by the defendant to quash an execution must be given to the plaintiff. (a)

*Judgment reversed.**Browning*, for plaintiff.*Davis* and *Forman*, for defendants.

(a) A hearing, or an opportunity of one, is a fundamental principle in all judicial proceedings. *Sears v. Low*, 2 Gilm. R., 281; *Hall v. O'Brien*, 4 Scam. R., 409; *O'Conner v. Mullen*, 11 Ill. R., 59; *S. C. ibid.*, 118; *People v. Williamson*, 18 Ill. R., 662; *Propst v. Meadows*, *ibid.*, 168; *McClusky v. McNeely*, 8 Gilm. R., 582; *Cummings v. McKenney*, 4 Scam. R., 59; *Auditor v. Hall*, Bre. App., 8; *Holliday v. Swalles*, 1 Scam. R., 516; *Chandler v. Mullanphy*, 2 Gilm. R., 467; *Ryder v. Twiss*, 3 Scam. R., 4; *Aiken v. Webster*, 2 Gilm. R., 416; *Eddy v. the People*, 15 Ill. R., 386.

AYRES v. LUSK.

1 Scam. R., 536.

Appeal from Morgan.

AN ORDER of publication in a newspaper, is unnecessary to confer jurisdiction over non-resident defendants in an equity cause. An affidavit filed with the clerk, and a publication of the notice for the length of time prescribed by law, is sufficient without any action on the part of the court. (a)

LOCKWOOD, J.—This was a bill filed in the Morgan Circuit Court, on the chancery side thereof. The only particular error assigned is, that the Circuit Court should not have tried the cause before an order of publication was made against the defendants on whom the process was not served, and who did not appear. The record states that an affidavit was filed, showing satisfactorily that a part of the defendants below were non-residents, and that the clerk published a notice for four weeks successively in a public newspaper printed in this State, of the pendency of the suit, and requiring such defendants to appear and answer the bill, or that the same would be taken as against them, for confessed.

The fifth section of the "*Act prescribing the mode of proceeding in Chancery*," expressly authorizes the practice pursued in this case.

*Decree affirmed.**Marshall* and *Walker*, for appellant.*W. Thomas* and *Brown*, for appellees.

(a) The law as to *constructive* notice to a defendant.

1. In equity causes: *Pile v. McBratney*, 15 Ill. R., 818.
2. In the Supreme Court: *Orr v. Howard*, 4 Scam. R., 559.
3. In attachment causes: *Varlen v. Edmondson*, 5 Gilm. R., 272; *Pierce v. Carlton*, 12 Ill. R., 858.
4. In applications by administrators for the sale of real estate to pay debts of intestate: *Bowles v. Rouse*, 8 Gilm. R., 419.

The People v. The Auditor.

Gillet v. Stone.

THE PEOPLE v. THE AUDITOR.

1 Scam. R., 537.

Mandamus Application.

A PUBLIC officer has no vested right in an office created by the legislature. The law which conferred the function is repealable and when repealed the officer cannot compel the State to pay him his salary or fees of office for the residue of the term. (a)

*Mandamus denied.**J. Reynolds, Shields and Field*, for relator.*Olney*, attorney-general, for respondents.

(a) As to the tenure and rights of public officers: *Steel v. Com'rs. of Gallatin*, Bra. R., 25; *People v. Mobley*, 1 Scam. R., 223; *People v. Field*, 2 *ibid.*, 97; *Clark v. People*, 15 Ill. R., 218; *People v. Fletcher*, 2 Scam. R., 486.

GILLET v. STONE.

1 Scam. R., 539.

Error to Madison.

1. A MOTION to set aside a default is addressed to the discretion of the Circuit Court, and its decision thereon cannot be assigned for error.

2. After default a party is out of court, and instructions given to the jury of inquest must be regarded as *interlocutory*, and cannot be assigned for error.

3. Several counts in *case* may be joined in one declaration.

4. An averment in a declaration that the plaintiff resided, and the cause of action accrued, in the county where the suit was instituted, is sufficient to authorize the issuing of process of summons to a foreign county.

5. Where the verdict exceeds the *ad damnum* of the declaration the plaintiff may *remit* the excess.

*Judgment affirmed.**W. Thomas*, for plaintiffs.*Davis and Krum*, for defendants.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN JULY TERM, 1839, AT SPRINGFIELD.

HOLLENBACK v. WILLIAMS.

1 Scam. R., 544.

Appeal from La Salle.

1. Declaration on a note payable to "Williams and Lander," which describes the note as payable to the plaintiffs, who were the payees of the note, and who were described in the commencement of the declaration, as "Shadrach Williams and Henry Lander," the note was offered in evidence: *held*, no variance.
2. Under the act of March 2, 1839, proof of the execution of a note, and the identity of the payees, is dispensed with, unless the defendant verifies his plea by affidavit. (*a*)

Assumpsit.—Declaration in the usual form upon this note :

"June 14th, 1837. By the 1st of September next, I promise to pay Williams & Lander, the sum of two hundred and forty dollars, seven cents, it being for value received of them. As witness my hand.

"CLARK HOLLENBACK."

The other facts are sufficiently stated in the opinion of the court delivered by

SMITH, J.—The only question presented for decision in this case, is, whether there is a variance between the note produced in evidence and the one described in the declaration.

The declaration described the note as payable to the plaintiffs, who are Shadrach Williams and Henry Lander. The note produced in evidence is payable to "Williams and Lander." It is contended that this does not show that the promise is to pay to the plaintiffs, and that the identity of the persons to whom the payment is to be made is not proven by the bare production of the note; and that it was incumbent on the plaintiffs to show, by proof, that they are the persons to whom the note was given. The statute of the 2d March, 1839,

Hollenback v. Williams.

Armstrong v. Caldwell.

Gillet v. Stone.

"*regulating evidence in certain cases*," provides "That in trials of actions upon contracts express or implied, when the action is brought by partners, or by joint payees or obligees, it shall not be necessary for the plaintiffs, in order to maintain any such action, to prove the names of the co-partners, or the Christian names of such joint payees or obligees, but the names of such co-partners, joint payees or obligees, shall be presumed to be truly set forth in the declaration or petition." Under this provision, we think it was not necessary for the plaintiffs to have shown by proof, that they were the same persons to whom the note was payable, under the names of Williams and Lander. The proof of identity, in such cases, is dispensed with. At common law the presumption would be, that being the possessors of the note, they were the owners and persons to whom the promise was made, until the contrary was shown.

Judgment affirmed.

Strode and Scammon, for appellant.

Spring, for appellee.

(a) Vide Cooke's Stat., 258-4, sec. 14.

ARMSTRONG v. CALDWELL.

1 Scam. R., 546.

Error to La Salle.

1. WHERE a note is payable at a particular place no demand of, or presentment for, payment is necessary to sustain an action against the maker, either by the payee or indorsee.

2. Where the Supreme Court can, they will, instead of remanding a cause, enter the proper judgment in an action upon a written instrument.

Judgment reversed, but proper judgment entered.

Scammon, for plaintiff.

Spring, for defendant.

GILLET v. STONE.

1 Scam. R., 547.

Error to Madison.

WHERE process is sent to a foreign county, the plaintiff must not only aver that the plaintiffs reside in the county in which the suit is

Gillet v. Stone.	Evans v. Crosier.	Whitesides v. Lee.	Hunter v. Ladd.
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instituted, *but also* that the cause of action accrued in or was specifically made payable there.

Judgment reversed.

W. Thomas, for plaintiffs.

Cowles and Krum, for defendants.



EVANS v. CROSIER.

1 SCAM. R., 548.

Error to La Salle.

SAME principle as in preceding case.

Judgment reversed.

Thomas, for plaintiff.

Scammon, for defendant.



WHITESIDES v. LEE.

1 SCAM. R., 548.

Appeal from Jo Daviess.

AFTER the dissolution of a firm, of which the payee has notice, a note given by one partner in the name of the firm is illegal and void.

Judgment reversed.

S. A. Douglas and J. D. Urquhart, for appellant.

Davis and Forman, for appellees.



HUNTER v. LADD.

1 SCAM. R., 551.

Error to Municipal Court of Alton.

1. AN attachment bond must be sealed by the principal and surety.
2. Where the principal *only* moves to amend the bond by affixing his seal, which the court overrules and thereupon dismisses the cause, there is no error in the action of the inferior court.

Judgment affirmed.

Cowles and Krum, for plaintiff.

G. T. M. Davis, for defendant.

Russell v. Hogan.

Archer v. Spillman.

Greer v. Wheeler.

RUSSELL v. HOGAN.

1 Scam. R., 552.

Error to Coles.

1. ASSUMPSIT v. several—plea by one, default as to the others—no final judgment can be entered until the plea is disposed of.

2. In actions *ex contractu* v. several, the judgment must be an *unit*.

*Judgment reversed.**Linder*, for plaintiffs.*Ficklin*, for defendants.

ARCHER v. SPILLMAN.

1 Scam. R., 553.

Appeal from Edgar.

1. WHERE the record shows a “plea and issue,” but the plea and similiter is lost, the presumption is that the *issue* was one of fact.

2. Where an issue in fact is joined it must be tried by a jury.

3. The agreement to waive a jury upon the trial of an issue in fact must appear affirmatively of record.

4. Where pleadings are lost, the Supreme Court, upon the reversal of the judgment, will remand the cause, and permit the parties to plead *de novo*.

*Judgment reversed.**Webb*, for appellant.*Ficklin*, for appellees.

GREER v. WHEELER.

1 Scam. R., 554.

Appeal from Jasper.

1. INFANCY is not a *dilatory* plea, but goes to the very foundation of the action.

2. Where an infant is sued before a justice and neglects to plead his infancy there, and makes it for the first time in the Circuit Court on appeal, he is in time.

3. Appeals from justices are tried in the Circuit Court *de novo* as far as the merits of the cause are concerned.

*Judgment reversed.**Ficklin*, for appellant.

Goodsell v. Boynton.

Bruner v. Ingraham.

The People v. Royal.

GOODSELL v. BOYNTON.

1 Scam. R., 555.

Appeal from Cook.

1. WHEN no time is fixed, statutes take effect from their passage.

2. By the act of March 2, 1839, the term of the Cook Circuit Court was changed from the month of March to that of April—the judge, however, being ignorant of the passage of the law, held his court in March. The process in this cause was returnable to the March term, the declaration and plea were filed as of that term—issue joined, and by consent the cause was tried by the court without the intervention of a jury. *Held*, that the proceedings were CORAM NON JUDICE.

*Judgment reversed.**Scammon*, for appellants.*Spring* and *Butterfield*, for appellees.

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BRUNER v. INGRAHAM.

1 Scam. R., 556.

Error to the Municipal Court of Alton.

1. A MOTION to discharge bail is discretionary with the Circuit Court, and the decision thereon cannot be assigned for error.

2. Where a defendant is brought into court by process of *ca. ad resp.*, and the bail is discharged, the *capias* stands as a summons, and the court can proceed to judgment *v.* the defendant.

3. Where an assignment of error is illegal, the proper practice is for the defendant in error to demur.

4. Where the defendant, instead of demurring to an illegal assignment, joins in error, the court will of its own volition dismiss the writ of error.

5. Error cannot be assigned upon a collateral point arising during the progress of a cause.

*Cause dismissed.**G. T. M. Davis*, for plaintiff.*A. W. Jones*, for defendant.

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THE PEOPLE v. ROYAL.

1 Scam. R., 557.

Error to Madison.

1. THE people cannot prosecute a writ of error in a criminal cause.

The People v. Royal.

Trader v. McKee.

Russell v. Hugunin.

2. A joinder in error cannot confer jurisdiction upon the Supreme Court in a case, where, by the constitution, they have no power to hear and determine it.

Writ dismissed.

Semple, attorney-general, for plaintiffs.

J. B. Thomas and *Prickett*, for defendant.

TRADER v. MCKEE.

1 Scam. R., 558.

Appeal from Cook.

1. THE jurisdiction of courts, not of record, must affirmatively appear upon the face of their proceedings, or their judgments will be regarded as nullities.

2. This rule is especially applicable to the judgments of foreign justices of the peace.

3. Foreign laws must be pleaded and proved in our courts.

4. No presumptions will be indulged in by our courts in order to sustain the verity of the transcripts of judgments of justices of the peace rendered in a sister State.

Judgment reversed.

Butterfield and *Collins*, for appellants.

Beaumont and *Spring*, for appellee.

RUSSELL v. HUGUNIN.

1 Scam. R., 562.

Error to the Municipal Court of Chicago.

1. An execution issued upon a satisfied judgment is irregular, and will be quashed on motion, and proceedings thereunder will be set aside.

2. Evidence is admissible to prove that a payment of the amount of a judgment by one of the defendants, was not intended to extinguish the judgment lien, and the right to execute the same.

3. Where a court is abolished, the appellate court, upon a reversal of its judgment, will remand the cause to that court which is the legal custodian of the records of the defunct court.

DANIEL HUGUNIN recovered a judgment in the Municipal Court of the city of Chicago, against John B. F. Russell and Hiram Pearsons, who were impleaded with J. M. Faulkner, upon a promissory note made by Faulkner, as principal, and Russell and Pearsons, as sureties; and being indebted to the Chicago branch of the State Bank of Illinois, gave the cashier of said branch an order on Morris and Scammon, his attorneys, for the proceeds of the note when collected. Pear-

Russell v. Hugunin.

sons deposited in said branch the amount of the judgment, and brought to Scammon, one of Hugunin's attorneys, a memorandum from the cashier, that he had made a special deposit of that amount, or something to that effect, and stated to him that he did not wish the judgment satisfied, but wished to use the judgment in order to protect himself, as the judgment was a lien on his co-defendant's real estate.

Scammon assented, and directed an *alias* writ of execution to issue, but took no other concern in the matter. After the sale of Russell's lands upon the *alias* execution, the deputy sheriff brought to Scammon, the check of Pearsons for the amount of the judgment, which he received, and receipted the execution as the attorney of Hugunin, and paid the check over to the cashier of the Chicago Branch Bank, who credited Hugunin with the amount.

Russell, having given notice to Hugunin and Pearsons of his intention so to do, made a motion in the Municipal Court of the City of Chicago, at the April term, 1838, the Hon. Thomas Ford presiding, to quash the execution and set aside the sale under it. The motion was resisted; and on the hearing, numerous affidavits were read, in relation to the declarations of Pearsons at the time he made the arrangement with the bank and subsequently.

The cashier of the bank testified that the amount arranged with him by Pearsons was included, at the time of the arrangement, in a note and mortgage executed by Pearsons to the bank, to secure his indebtedness to the same, and that he understood the arrangement to be a payment of the judgment. Much other testimony was introduced, the substance of the material parts of which is stated in the opinion of the court.

SMITH, J.—The plaintiff in error prosecuted a motion to set aside an *alias writ of fieri facias* and the sale under the same, of certain real estate of the plaintiff in error, and to compel the plaintiff, in the original action, to enter satisfaction of record, on the ground that the judgment had been fully paid and satisfied by Pearsons, who was a co-defendant with Russell, before the suing out of the *alias writ of fieri facias*, and before sale had under the same. The Municipal Court overruled and dismissed the motion; to which opinion and order of the Municipal Court, the plaintiff in error excepted; and the facts on which the application was based and resisted, appear in the bill of exceptions.

From an attentive consideration of the evidence contained in the depositions, we have concluded that this evidence establishes,

1. The payment of the full amount of the judgment by Pearsons,

one of the co-defendants, to the agent of the plaintiff in the original judgment, under a written authority from Hugunin, the plaintiff, to receive the same; and that the agent applied this amount so received on the judgment, to the payment of a bill of exchange due by Hugunin to the branch of the State Bank of Illinois at Chicago, of which Hugunin's agent was then the cashier, the bank being the holder of the bill.

2. That after this payment the *alias* writ of *fiery facias* was issued, and placed in the hands of the deputy sheriff, Smith, who swears that Pearsons, the co-defendant of Russell, had the entire control of the writ of execution. That he, Smith, acted under his orders, and not the plaintiff, Hugunin's, (who declared he had no longer any interest in the cause,) and sold the real estate named in his return, by the directions of Pearsons, who also became the purchaser.

There are other facts attending the transaction, showing clearly that Pearsons, after the payment, represented the judgment as discharged, and that it was no longer a lien on his real estate, and that he did actually effect loans on mortgage of his real estate, under such representations. We cannot doubt, then, that the payment extinguished this judgment, and that the parties so intended the payment should be applied. It does not appear that Pearsons owed to Hugunin any money on any other account, and if the money so paid was not intended to be so applied, to what possible object was it to be carried? Pearsons would not surely make it a gratuity; and the only rational inference to be drawn from the facts, is, that as it was paid on the order to Brown, the cashier of the bank, and corresponded with the amount of the judgment and interest thereon up to the day of payment, it was paid in extinguishment thereof. Brown so considered it, and all parties at the time. The subsequent application of Pearsons to Brown, to alter the entries on the books of the bank, shows that it was an after-thought of Pearsons, to change the application for the purpose of using the execution to enforce the payment of the judgment by Russell; and it appears that the real estate of Russell was sold to the amount of the whole judgment, not for a moiety, which in equity each party might be liable only to pay, as between them. There is one circumstance which it seems to us is conclusive in this question. It was competent for Pearsons or Hugunin to have shown, on the hearing, that the payment to Brown was not in extinguishment of the judgment; not having done so, the conclusion is irresistible, that the payment was made on the judgment, and if so, then it was in satisfaction thereof. Considering that the judgment was fully satisfied by the payment to Brown, we are of opinion that the judgment of the Municipal Court was erroneous. and should be reversed.

Russell v. Hugunin.

Cushman v. Rice.

It is therefore ordered that the judgment of that court overruling the motion, and dismissing the same, be reversed; and this court proceeding to render such judgment as the Municipal Court ought to have done, do order and adjudge, that the said writ of *alias fieri facias*, and the sale, and all other proceedings founded thereon, be set aside and annulled, and for nothing esteemed, and that the plaintiff, Hugunin, enter satisfaction of record on said judgment in the Circuit Court of the county of Cook, and that the plaintiff in error recover his costs in this court and the court below. And it is further ordered, that the clerk of this court certify this judgment to the clerk of the Circuit Court of the county of Cook, where the records and proceedings of the said Municipal Court have been transferred by the law abolishing the said Municipal Court, in order that the said Circuit Court shall do what of right ought to be done in the premises, to give effect to this judgment, and cause satisfaction of record to be entered on said judgment.

Judgment reversed.

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CUSHMAN v. RICE.

1 Scam. R., 565.

Error to Fayette.

1. A petition to remove a cause from a justice of the peace into the Circuit Court, by *certiorari*, after the time for an appeal has expired, should show that the judgment is unjust, and wherein that injustice consists, and also state a legal excuse for not removing the cause by appeal. (a)
2. The absence of a plaintiff from the county, who has left a note with a justice for collection, and in ignorance of the fact that he was defeated in an action upon the note, are insufficient reasons for removing the cause into the Circuit Court by writ of *certiorari*.

THE petition for the *certiorari* in this cause stated, "That some time in the month of July last, he placed in the hands of one Allen McPhail, Esq., a justice of the peace of said county of Fayette, a note of hand for collection, on E. J. Rice and F. E. Doolittle, on which suit was commenced by summons, and the trial was had on the 27th day of August, 1838, in the absence of your petitioner, and the said justice, after hearing the matter, and receiving various testimony wholly inadmissible and irrelevant, determined and gave judgment against your petitioner for the costs of suit. At the time said judgment was rendered against your petitioner, he was absent from the county, and was not informed, nor did he know that said judgment was given against him, until after the expiration of the twenty days allowed by law for taking appeals; and he was wholly and entirely prevented from taking an appeal, in consequence of his absence from the county, and his inability to get to Vandalia. He further states

Cushman v. Rice.

Holmes v. Parker.

that said suit was commenced on a promissory note for the payment of money, for a good and valuable consideration, and the said justice should, and of right, according to law, ought to have given judgment for your petitioner, when, in fact, he erroneously gave judgment against him, and in favor of the defendant in said suit."

WILSON, C. J.—This case was taken from the judgment of a justice of the peace, to the Circuit Court, by writ of *certiorari*, as allowed by statute; and by that court the cause was dismissed. From this decision the plaintiff below has appealed to this court. The statute allowing causes to be taken to the Circuit Court in certain cases, requires the petition for that purpose to set forth that the judgment complained of was not the result of negligence on the part of the petitioner, and that in his opinion it is unjust—setting forth wherein the injustice consists. It must also allege that it was not in the power of the party to take an appeal in the ordinary way; and set forth particularly the circumstances that prevented him from so doing. This last requisition of the statute has not been complied with in this case. The petition alleges no other reason for not taking an appeal within the time limited by law, than absence from the county, and ignorance of the judgment rendered by the magistrate. This is not a sufficient excuse to except the case from the ordinary mode of appeal. When a party brings an action, he is bound to attend to it through all its stages, either by himself or agent, and if he omits to do so, he must abide by the consequences of his inattention, unless he set out with precision, such facts and circumstances as show that it was not in his power to take an appeal in the ordinary way, by the exercise of every reasonable degree of attention and care. This has not been done by the appellee in this case.

Judgment reversed.

Field, for plaintiff.

Davis and Forman, for defendants.

(a) Statute—Cooke's Stat., 709-710. Decisions: Yunt v. Brown, 1 Scam. R., 264; Hoare v. Harris, 14 Ill. R., 86; White v. Frye, 2 Gilm. R., 58; Gallimore v. Dazey, 12 Ill. R., 144; Lord v. Burke, 4 Gilm. R., 868; Stout v. Slaterry, 12 Ill. R., 162; Murray v. Murphy, 16 ibid., 275; Hough v. Baldwin, ib., 293; Russell v. Pickering, 17 ib., 25; Chicago & Rock Island R. R. Co. v. Fell, 22 Ill. R., 383; Same v. Whipple, ibid., 387.

HOLMES v. PARKER.

1 Scam. R., 567.

Appeal from Peoria.

1. Where the appellee moved upon affidavit for a *certiorari* to the Circuit Court, upon an allegation that the transcript of the record, made by the clerk of the inferior court, did not contain *all of the facts* which occurred in the lower court, the writ may be issued.

Holmes v. Parker.

Brooks v. Jacksonville.

2. A writ of *certiorari* will be awarded by the Supreme Court, whether the transcript of the record of the inferior court is *diminished* or *augmented*.
3. Where the clerk of the inferior court *fails to perform his duty*, neglecting to indorse, as filed, a paper appertaining to the proceedings in a cause originating in his court, and an appeal is taken, but a full transcript of the record is withheld, a writ of *certiorari* lies.

THE facts were thus: at the December term, 1838, of this court, the attorney for the appellee, made affidavit that so much of the record in this cause, as stated that an appeal was prayed and granted, and a bill of exceptions tendered, allowed, signed, and sealed, and ordered to be made a part of the record, which was done, etc. (although a correct statement of what transpired in court), was an interpolation of the person who transcribed the record, and obtained a writ of *certiorari* to the court below, to send up a true record.

The clerk, in obedience to the writ, certified that among the papers in the case, were the bill of exceptions signed and sealed by the judge, and the appeal bond mentioned in the exemplification of the record before sent up, but the same were *not marked filed*.

Per Curiam.—The *certiorari* was properly granted. If in a case like the present, the writ could not issue, there might be no remedy for an interpolation of a record.

Appeal dismissed.

Frisby and Metcalf, for appellant.

S. T. Logan, for appellee.



BROOKS v. JACKSONVILLE.

1 Scam. R., 568.

Appeal from Morgan.

1. JUDGMENT on debt rendered by the Circuit Court—*debt* \$50, *damages* \$11 $\frac{5}{8}$ —appeal prayed and granted—the condition of the appeal bond recited a judgment for \$61 $\frac{5}{8}$ without distinguishing between the debt and damages, and showing a variance in the aggregate sum of five cents—held a fatal variance, and the appeal dismissed.

2. Even a slight variance between the judgment rendered, and the recital in the appeal bond, will be treated by the Supreme Court as a ground of dismissal.

3. When an appeal is dismissed upon a technical ground, the Supreme Court will not permit the withdrawal of the transcript of the record, with a view to a writ of error.

4. A transcript filed in an appeal cause is a part of the record in the Supreme Court.

Appeal dismissed.

Brown, for appellants.

McConnel, for appellee.

HERRINGTON v. HUBBARD.

1 Scam. R., 569.

Appeal from Cook.

1. A vendee of land cannot rescind the contract, and after the rescission compel a specific performance.
2. Where a vendee sues for and recovers back money upon a contract of purchase, upon the ground that the vendor was in default, this is a virtual rescission of the contract.
3. Where it appears upon the face of an answer in chancery, that a third party is interested in the cause, who has not been made a party, the bill will be dismissed.
4. A bill will be dismissed upon the hearing, for want of proper parties, though no demurrer is interposed.

THE facts were, that some time in February, 1835, the complainant, Hubbard, entered into an agreement with Herrington, the defendant, for the purchase of a tract of land containing fifty acres, upon the following terms, to wit: "Five hundred dollars to be paid by the said Hubbard to the said Herrington on the delivery of the deed of the same, on or before the first day of April next; thirteen hundred and seventy-five dollars to be paid within eighteen months from this date without interest; thirteen hundred and seventy-five dollars to be paid within eighteen months from this date, with interest at six per cent., and five hundred dollars within the month of May next without interest. The said Herrington to make a good and sufficient warranty deed, in fee simple, released from the right of dower; and the said Hubbard to make the payment as aforesaid."

The bill avers, "That the complainant paid the said sum of five hundred dollars, on or before the first day of April aforesaid, and that he has always been ready and willing to perform his part of said agreement; and, on having a good deed from Herrington for the premises, is willing to pay the residue of the purchase money according to the agreement." It also avers, "that Herrington refuses to perform on his part."

On the 2d of May, the complainant prosecuted an action of covenant against Herrington, to recover damages for the non-performance of his agreement. On the 7th of same month, the complainant instituted other proceedings against the said Herrington, to wit, an action of *assumpsit*, for the recovery of the money which he had paid upon the first installment. Afterward, to wit, on the 30th May, and before

the filing of this bill, Herrington, regarding the contract as rescinded by the prosecution of the action of *assumpsit*, entered into a negotiation with one Truman G. Wright, for the sale of the said land, which resulted in a written contract to sell on the 3d of June following, upon which day, the defendant Herrington, in good faith, and for a valid consideration, executed a deed in fee of said premises to the said Wright. On the 5th day of June, two days after the execution and delivery of the deed to Wright, Hubbard made a tender of \$478 11, to Herrington, with a mortgage ready executed, and notes to secure the residue of the purchase money, which he refused on the ground that said Hubbard had waived all right to a conveyance by prosecuting the defendant, Herrington, for a recovery of the money paid on the contract. After the refusal of the tender, and on the same day, the complainant filed this bill for a specific performance of the agreement, and abandoned his suits at law.

The cause came on to a hearing, and the court decreed that Herrington should convey the lands set forth in the bill, by metes and bounds, to the complainant. Herrington appealed to this court.

SMITH, J.—Hubbard filed his bill against Herrington in the Cook Circuit Court, to compel the specific performance of a written contract to convey fifty acres of land, for the consideration of \$3,750, payable by installments, at different periods of time. It is deemed unimportant to the decision of the cause, to state with precision the terms of the contract, or the facts attendant on the first payment, and the subsequent overture and negotiations between the parties, to carry out the objects of the agreement, as they appear from the evidence, because it is supposed that there are three highly important points developed by other evidence, on which the decision of the case must of necessity rest, independent of these.

It appears that Hubbard, previous to the filing of his bill in equity, commenced in the Cook Circuit two actions at law, against Herrington, on this same contract; the first on the 2d of May, 1835, in covenant, to recover damages from Herrington for the non-performance of the contract on his part; and the second on the 9th of May, of the same year, in *assumpsit*, to recover back the amount of the consideration money paid by him. Both of these suits were subsequently dismissed, and the cause in equity instituted.

On the 3d of June, 1835, and before the filing of the bill in equity, Herrington entered into a written contract with one Truman G. Wright, to sell and convey the same lands to him, for the consideration of \$7,440; and on the 23d of the same month actually executed and

delivered to Wright a full and absolute conveyance of these lands, which was placed for record in the office of the recorder of the county of Cook, on the 1st of July following. From these facts, which are incontrovertible, three questions arise: First, was not the institution of the action of assumpsit, a virtual rescinding of the contract between Hubbard and Herrington, and in legal contemplation must it not be so considered? Secondly, were not Herrington and Wright justified in so considering it; and is not the contract and sale between them for these lands valid, Wright being a purchaser for a valuable consideration? Thirdly, ought not Wright to have been made a party in the suit; and if so, is not the decree erroneous for the omission to name him in the bill?

Whatever may have been the state of facts between the parties, as it regards the payment of the first installment, and the readiness of Hubbard to complete the others after the time for the second payment had expired, there would seem to be no rational doubt that Hubbard had determined to treat the contract as rescinded, by the acts of the parties, in their non-compliance to carry it into execution at the precise time stipulated.

He first institutes his action of covenant to recover damages for the non-performance of Herrington of his portion of the agreement; and afterward brings his action to recover back the consideration money paid. We think this is sufficient evidence of his determination to treat the contract as rescinded; and that it is equivalent to an express disaffirmance of it. Such must be the legal intendment of his act; for he certainly could not recover back the consideration money paid, but on the ground of a disaffirmance.

Herrington, then, had a right so to consider it; and was at liberty to treat, and enter into a contract with Wright for a sale to him of the lands. Wright finding this suit pending, must have considered it a disaffirmance (and we are justified in presuming that Wright had notice, because the proceeding in legal contemplation is notice to every person) and felt that he might legally enter into a contract with Herrington for the sale and purchase without the existence of any obstacle; and accordingly did so, and consummated the purchase on the 23d of June, 1835.

It will be perceived that the agreement between Wright and Herrington is entered into on the 3d of June, 1835, two days previous to the filing of the bill. Wright, therefore, purchased without any knowledge that Hubbard had any intention of insisting on a specific performance of the original contract between him and Herrington.

There is no dispute that Wright is a purchaser for a valuable consideration; and we think from the facts, as they appear, that he acquired a legal title to the lands. Herrington being at perfect

liberty to treat the contract as disaffirmed by the prosecution of Hubbard, to recover back the consideration money. It was urged at bar, that Hubbard had concurrent remedies, that he might proceed at law and equity at the same time; though he could not obtain damages and enforce a specific performance, he might elect which remedy he would pursue, and which to abandon, after their institution. The doctrine of concurrent remedies is not disputed; but he surely could not proceed to recover back in an action at law, the consideration money paid, which must be based on an actual or constructive disaffirmance of the contract; and also obtain a decree for the specific execution of a contract, pronounced by a judgment at law disaffirmed. The action for damages for the non-performance of the contract in covenant, and his remedy in equity, might probably have been proceeded in at the same time; and he might have elected which he would prosecute to final judgment; but most certainly the action in *assumpsit*, for the consideration money, cannot be ranked under the class of those termed elective.

For these reasons we think the decree is erroneous, and that on the first two points it should be reversed.

With reference to the third, upon the supposition that our views on the first and second are not justified, the interest which Wright had acquired in the lands, required that he should on the coming in of defendant's answer, which disclosed that interest, have been made a defendant to the bill. The rule is almost inflexible—certainly so, where it can be done without extraordinary difficulty, or where the defendants are not very numerous, and do not reside in remote and distant countries, that all parties in interest shall be made defendants, so that no decree shall be made which can affect their interest, without their being heard. Courts will take notice of the omission, though no demurrer be interposed for want of proper parties, when it is manifest that the decree will have such an effect. As then the decree in this case manifestly adjudges Wright's title to the land void, it is, we think, for this reason, erroneous—Wright having had no opportunity to defend his interests, which have been taken away without a hearing.

For the reasons assigned, and a conviction that there is not sufficient equity in the bill, and that Hubbard has voluntarily abandoned those he may have acquired under the contract, we are of the opinion that the judgment of the Circuit Court should be reversed, and the bill dismissed with costs.

Decree reversed.

Collins and Spring, for appellant.

Scates and Grant, for appellee.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

IN DECEMBER TERM, 1839, AT SPRINGFIELD.

HUGUNIN *v.* NICHOLSON.

1 Scam. R., 575.

Error to Cook.

1. A JUSTICE has jurisdiction where the sum in *controversy* does not exceed *one* hundred dollars, though the investigation involves the necessity of examining a long unsettled account between the parties. (*a*)

2. Where a cause originates in an inferior court, the jurisdiction of which is limited, as to the sum in controversy, the Supreme Court will, in order to justify the inferior court, presume that credits *voluntarily* given by the plaintiff to the defendant were *bonâ fide*.

3. The Supreme Court will indulge in presumptions, in order to sustain the jurisdiction of a justice of the peace.

Judgment reversed.

Scammon, for plaintiff.

Arnold, for defendant.

(*a*) The earlier decisions of this court originated under a peculiar statute which limited the jurisdiction to one hundred dollars without reference to balances; under this statute, the court held that a justice could not investigate a demand which involved the examination of mutual accounts beyond the sum of \$100. But the present law is, that a justice may render judgment for \$100, although the case involves mutual dealings to a larger amount; *provided*, that upon a fair and *bonâ fide* accounting the balance due does not exceed \$100. *Vide* Cooke's Stat., 687, sec. 18.

LURTON *v.* GILLIAM.

1 Scam. R., 577.

Error to Morgan.

1. The non-joinder of a party defendant in an action *ex contractu*, must be pleaded in abatement.
2. A promise to pay a merchant a fixed sum of money for an article, upon the contingency that a stranger is elected to Congress, is valid.

Lurton v. Gilliam.

3. The governor's proclamation of an election is evidence of the fact proclaimed.
4. The State paper, or gazette, is admissible to prove the authenticity of an executive proclamation.
5. Interest is recoverable upon a contingent debt from the time of the happening of the contingency.

THE facts are detailed in this bill of exceptions.

"Be it remembered, that on the trial of this cause, the plaintiff produced a witness who testified that when the goods were bought, a memorandum of the transaction was made upon the plaintiffs' books, and the clerk of the plaintiffs then produced a copy of the memorandum, which was filed, and is herewith made a part of the record in this cause:

P. M. Brown and James Lurton			
To 2½ yards Fine Cloth, \$12,	.	.	\$28 00
Trimmings for Coat,	.	.	6 00
			\$34 00

'If Mr. Douglass is elected to Congress, P. M. Brown is to pay for the cloth; if Mr. Stuart is elected, James Lurton has it to pay.'

"Whereupon the plaintiffs offered in evidence the State paper, and read therefrom the proclamation of the governor of Illinois, declaring the election of Stuart to Congress, which was objected to by the defendant, but admitted by the court. The defendants then moved the court to dismiss the suit, and reverse the judgment below, because the contract appeared to have been made between the defendant in connection with P. M. Brown, and the credit was given to the two, and not to either one of them, and because the plaintiffs appeared to be a party to the original bet or contract; all of which motions were overruled by the court, and the court proceeded to render judgment for the plaintiffs for the amount of the judgment below: To all of which opinions of the court, the defendant, by his attorney, excepts, and prays that this, his bill of exceptions, may be signed, sealed, and made part of the record in this cause, and which is ordered to be done.

"SAML. H. TREAT. [L.S.]"

SMITH, J.—In this case the grounds of error assigned and relied on, are,

1st. That Brown and Lurton should have been joined in the action, the credit being joint.

2d. That the defendants in error were parties to an illegal contract.

3d. That the evidence offered to prove the result of the election, being the State paper, was inadmissible as evidence.

4th. That the addition of interest to the principal, ought not to have been allowed.

Lurton v. Gilliam.

State Bank v. Hawley.

The first objection is not good. If the parties were only jointly liable, the plaintiff in error should have pleaded that matter in abatement. But the contract was manifestly in severalty.

From the facts disclosed by the bill of exceptions, it appears that the contract for the cloth, although a contingent one as to the ultimate liability of the one or the other of the parties, was to be absolute, as to the party who should lose the bet. The purchase was made and the credit given, after the consummation of the bet.

It does not appear that the defendants in error were in any way parties to the bet, or encouraged it; and we do not perceive that their contract for the sale and delivery of the cloth, was tainted with a participation in the original agreement between the parties. Their mere knowledge of it could not certainly connect them with it; and having parted with their property under the arrangement, common honesty surely requires that the party at whose instance it was delivered, conformably to his agreement, should be held answerable for the value of the merchandise delivered. Money loaned to be used in gaming, could heretofore have been recovered back at common law, but it is now prohibited by the statute against gaming.

It is not now necessary to go into the various reasons given for the decisions which have prevailed in courts, relative to gaming contracts, because this contract cannot be considered *contra bonos mores*, or against sound policy. The case in 4th Johnson, of *Bum v. Rucker*, has no affinity to the present action. The State Register, being made by law the public paper in which the official acts of the governor required to be made public, are to be published, was evidence of the existence of the proclamation, and the facts stated in it, until the contrary was shown. On the question of interest, we are of opinion that it was properly allowed. The statute giving interest on all liquidated accounts, embraces the case directly.

Judgment affirmed.

McConnel and McDougal, for plaintiff.

W. Brown, for defendants.



STATE BANK v. HAWLEY.

1 Scam. R., 580.

Error to the Municipal Court of Alton.

1. Notice of the non-payment of a note is not necessary to charge an indorser.
2. The absence of the maker from the State when a note matures, is an ample excuse for not using diligence by suit, to recover the contents.

WILSON, C. J.—This action was instituted by the bank, against the defendant, Hawley, upon the following note, to wit :

State Bank v. Hawley.

Caton v. Harmon.

"\$500. One hundred days after date, for value received, I promise to pay H. Hawley, Esq., or order, the sum of five hundred dollars; negotiable and payable at the branch of the Bank of Illinois at Alton.

"J. CHEEVER, Jr."

This note was assigned to the bank on the same day it was made. The declaration is in the usual form, with an averment that Cheever, the maker of the note, was before the note became due, and ever since has continued to be, a non-resident of the State of Illinois, and beyond the jurisdiction of the court. The case was submitted to the court to be decided according the law applicable to it; and it decided against the plaintiffs' right to recover, upon the ground that the bank had failed to give notice to the defendant, the assignor, that payment of the note had been demanded and refused at the bank. This decision is erroneous. No such notice is necessary in order to charge the assignor of a note; the rule is different from that applicable to bills of exchange.

Judgment reversed.

G. T. M. Davis, for plaintiffs.

Jones, for defendant.



CATON v. HARMON.

1 SCAM. R., 581.

Appeal from the Municipal Court of Chicago.

When a non-resident sues for the use of a resident, a cost bond is unnecessary.

BROWN, J.—This was an action of *assumpsit* brought in the Municipal Court of the city of Chicago, by Isaac Harmon, for the use of Lemuel C. P. Freer, against John D. Caton. The defendant below moved the court to dismiss the cause, predicated upon the following affidavit:

"John Dean Caton, being duly sworn, doth depose and say, That the said plaintiff, Isaac Harmon, removed from the State to the Territory of Wisconsin, about one year since, where he had resided with his family ever since, as deponent hath been informed, and verily believes. That he was informed by said plaintiff, a short time before the commencement of this suit, that he, the said plaintiff, was then residing in Wisconsin, with his family, that he was cultivating a farm there, and that he liked the place, and intended to reside there permanently. And deponent further saith, that he has not seen the said plaintiff in this State since, nor has he heard of his being here since, and further deponent saith not."

Caton v. Harmon.

McConnel v. Shields.

Hamilton v. Wright.

The suit was brought for the use of Freer, and he was the person beneficially interested. Nothing in the affidavit showing that Freer was a non-resident, it is to be strongly inferred that he was a resident. In all cases in law or equity, where the plaintiff or person for whose use an action is to be commenced, shall not be a resident of this State, the plaintiff or person for whose use the action is commenced, shall, before he institute such suit, file, or cause to be filed, with the clerk of the Circuit or Supreme Court in which the action is to be commenced, an instrument in writing of some responsible person, being a resident of this State, to be approved of by the clerk, whereby such person shall acknowledge himself bound to pay, or cause to be paid, all costs, etc.

*Judgment affirmed.**Spring and Goodrich*, for plaintiff.*Grant and Scammon*, for defendant.

MC CONNEL v. SHIELDS.

1 Scam. R., 582.

WHERE the Supreme Court have reason to believe that a cause is *feigned*, they will continue the suit and require the parties to produce evidence of good faith.

Cause continued and notice directed.

HAMILTON v. WRIGHT.

1 Scam. R., 582.

Error to Cook.

1. WHERE a party sues at law to recover a *penalty*, he must set forth, in his declaration, the specific grounds of his claim.

2. Where a note is payable with ten per cent. interest, and a statute declares that if the *principal and interest is not paid* at maturity, that the plaintiff may recover interest at the rate of twenty per centum per annum, this is to be regarded as a penalty.

*Judgment affirmed.**Peyton*, for plaintiff.*Spring*, for defendant.

Mulford v. Shepherd.

MULFORD v. SHEPHERD.

1 Scam. R., 583.

Error to Will.

1. The only defences which can be made to a promissory note as against a *bonâ fide* holder thereof who acquires title before maturity, are :

(1.) Actual notice of the facts and equities which existed between the original parties at the time of the indorsement.

(2.) Where the *execution* of the note was obtained by fraud, and circumvention on the part of the payee.

2. Fraud in the consideration of a note is no defence to an action brought by a *bonâ fide* holder thereof, who acquired his title prior to the *maturity* of the note.

SMITH, J.—This was an action by the indorsee of a promissory note, indorsed before the day of payment, against the maker. The declaration is in the usual form. The defendant pleaded the general issue, and by agreement had leave to give any special matter in evidence, under the plea, which would amount to a bar to the action. It appears that a judgment was rendered on a general verdict for the defendant.

From the bill of exceptions (which makes by reference to it, an affidavit of the plaintiff's counsel, a part thereof), it appears that it was proved on the trial, that the note was given as a part consideration for the payment of a tract of land purchased of the indorser of the note, by the maker; and that a false statement had been made by the indorser to the maker of the note (who is defendant here), as to the quantity of ploughed land contained in the tract; and that he had also suppressed the knowledge from the maker, that a tenant on the land had a lease of a part thereof; and the defendant had to pay the tenant seventy-five dollars to leave the premises. That no evidence was adduced on the trial tending to show that the plaintiff had at the time of the indorsement and transfer of the note, any knowledge of the consideration for which the note was given, or the circumstances under which it was made. Other facts, of minor importance, are stated, which it is not necessary to recapitulate. The plaintiff moved for a new trial, which the Circuit Court refused.

The assignment of errors questions the correctness of the decision of the Circuit Court in refusing to grant the new trial, and in admitting the evidence to impeach the consideration of the note in the hands of the holder, without showing notice to him of the failure, or part failure of the consideration thereof, before the assignment, or showing the transfer of the note after it became due.

We think the evidence was improperly admitted to the jury, or, in other words, that the evidence formed no defence to the action.

It could be no ground of defence against the innocent holder of a negotiable note assigned before it became due; nor can the evidence be applied as matter of defence under the 6th section of the act rela-

Mulford v. Shepherd.

tive to promissory notes, and other instruments in writing, made assignable by the act of the 3d January, 1827, which admits of a defence against the assignee, as well as the payee of an assignable note or instrument in writing, where fraud or circumvention is used in the obtaining, the making or executing of such instrument.

This case falls directly within the principles of the rule laid down in the case of Woods against Hynes, decided in this court at the December term, 1833. In that case the defendant pleaded specially that the note was obtained by fraud and circumvention, the goods for which it was given being less in quantity, and deficient in quality, from what they were represented to be by Wilkin, the payee of the note. In that case, we said "It would be apparent that the plea would have been no bar to the action on the note in the hands of an innocent indorsee or assignee, as has been repeatedly adjudged; nor would the 6th section of the act above referred to, give the right to interpose such a defence, where there is a mere deficiency in the quality or quantity of the article sold, as between the maker and the assignee. The section declares that if any fraud or circumvention be used in obtaining the making or executing of any of the instruments described, it shall be void, not only between the maker and payee, but every subsequent holder. We further held that that case did not come within this provision.

The fraud charged consisted in the contract itself, not in the obtaining the making of the note. If a person represent a note to contain a particular sum, when in truth the amount is much greater, and obtain an execution of it, there would be a case contemplated by the statute, and the note would be void, not only between the maker and payee, but between him and every subsequent holder. That, however, was not the case under consideration, for the plea admitted a valuable consideration, but denied one to the extent of the face of the note, because of the deficiency in quantity and quality of the articles sold, which were alleged to be of full value. It would not be denied but that the plaintiff was entitled to recover the value of the goods, even if he had stood in the place of the original payee, but being an innocent holder before the note became due, it is most clear that the matters of the plea would be no legal defence to the action.

The facts in this case are of precisely similar character. The false suggestion as to the value and improvement of the land, with the suppression of the fact of occupancy and lease of a part of the premises to the tenant, could only operate to proportionately reduce the value of the tract of land, but would not, we apprehend, render the note void even between the original parties. As between them, in an

Mulford v. Shepherd.

Maxcy v. Padfield.

action on the note, it might perhaps be matter of defence to the extent of the depreciation; but this could not render the note void between the maker and assignee. It will be thus seen that the facts disclosed do not amount to the nature of the defence contemplated by the statute; and the misapplication of the facts to the law, is, we think, very apparent.

The verdict for the defendant was, then, certainly not right or just under the law, and its correction is demanded by every consideration of justice. We are accordingly of opinion that the judgment should be reversed with costs, and a new trial granted.

Judgment reversed.

Scammon and Beaumont, for plaintiff.

Osgood, for defendant.



MAXCY v. PADFIELD.

1 SCAM. R., 590.

Error to Clinton.

1. The maker and indorser of a note cannot be sued jointly.
2. A justice cannot render a judgment against one of several parties to a suit, where he has not been duly served with process.
3. On appeal from the judgment of a justice, the Circuit Court cannot permit an amendment to avoid the legal effect of a misjoinder of parties defendant.
4. Nor can any amendment be allowed upon appeal, where the justice had no jurisdiction.
5. Nor can the appellate court change, by amendment, the form of the original action, or the parties thereto, under pretence that an appeal must, by statute, be tried *de novo*.
6. Where a cause originated before a justice, and a jurisdictional defect exists, and upon the hearing of an appeal in the Circuit Court the decision of the justice is affirmed, the Supreme Court will reverse each judgment and not remand the cause.

THIS was an action originally commenced by William Padfield against Samuel McCullough and A. G. Maxcy, before William Johnson, a justice of the peace of Clinton county, upon a promissory note made by Samuel McCullough to Anderson W. Petty, and by said Petty indorsed to Samuel G. Smith, and by said Smith indorsed to A. G. Maxcy, and by said Maxcy indorsed to the defendant in error.

The summons was issued against McCullough and Maxcy, and returned executed upon Maxcy only.

On the day set for the trial of the action, neither of the defendants appeared, and judgment was rendered against them by default. From this judgment Maxcy appealed to the Circuit Court of Clinton county.

At the next term of the Circuit Court, the Hon. Sidney Breese presiding, Maxcy, by Cowles, his attorney, moved the court to dismiss the cause and reverse the judgment of the justice. The Circuit Court overruled said motion, and on motion of the plaintiff, by Reynolds, his

Maxcy v. Padfield.

Burlingame v. Turner.

attorney, leave was granted to amend the papers by striking out the name of Samuel McCullough.

Thereupon a jury was called, and a verdict rendered for the plaintiff, and judgment entered upon said verdict. From this judgment Maxcy prosecuted a writ of error to this court.

SMITH, J.—The assignment of errors questions the regularity and power of the court to strike out the name of one of the defendants in the action before the justice of the peace. The original summons was the foundation of the action. The plaintiff in that action elected to mis-join parties who upon no legal principles could be joined in the same action, and the judge was manifestly erroneous, as well for the mis-joinder, as for rendering judgment against McCullough, who had not been served with process. We cannot doubt that the court had no power to abate the suit as to one of the defendants, at common law, on the plaintiff's motion, and we do not conceive that the statutes allowing of amendments relative to proceedings before justices of the peace, confer the power. The effect of the amendment is to change the character of the action, as to parties, and virtually to constitute a new action. This surely could never have been the intention of the legislature, in the several acts allowing amendments in the Circuit Court, to proceedings had before justices of the peace.

The defendants might avail themselves of this misjoinder, but surely the plaintiff in the action before the justice, could not discontinue his cause as to one of them, and hold the other liable. The cases cited to support the power to thus amend process, we conceive, have no bearing on the point before the court, and do not countenance the amendment.

The judgment is reversed, as well in regard to the proceedings and judgment before the justice, as in the Circuit Court, with costs.

Judgment reversed.

Cowles and Bond, for plaintiff.

Trumbull and Gillespie, for defendant.



BURLINGAME v. TURNER.

1 Scam. R., 588.

Appeal from Peoria.

1. COURTS will decide questions material to the principal *rights* of the parties. But they will not decide upon collateral or technical questions, unless their attention is called to such secondary rights by motion, or in some other formal mode.

Burlingame v. Turner.

Kettelle v. Wardell.

2. The courts will not, of their own volition, continue a cause, even where an affidavit for a postponement is on file—a *motion* to the court is an essential prerequisite to the hearing of the application.

3. Nor will the court, *upon its own mere motion*, set aside an *immaterial* issue and award a *repleader*.

4. The Supreme Court will not, upon the hearing of an appeal or writ of error, grant a continuance, or award a repleader, where the party demanding it has not called the attention of the inferior court to the point.

5. The Supreme Court, in the exercise of its appellate jurisdiction, examines and reviews the *errors* of the lower tribunals, and will not tolerate the practice of delay in asserting technical rights, where the error might have been rectified, if pointed out in due season—but on the contrary will, in support of the judgment of the Circuit Courts of the State, resort to the doctrine of *presumptions* and *waivers*.

6. A bill of exceptions is essential in order to justify the reversal of a judgment upon collateral issues—such as motions etc.—of a dilatory character.

7. Where matters of law and fact are submitted to the court, and the judgment is for the plaintiff, the judge may direct the clerk to assess the damages.

Judgment affirmed.

Ballance and Walker, for appellant.

Frisby and Metcalf, for appellee.



KETTELLE v. WARDELL.

1 Scam. R., 592.

Appeal from Peoria.

1. A *PRÆCIPE* is a part of the files and records of our courts, and words of reference thereto may be regarded in determining the legality of a subsequent paper.

2. A bond for costs, written upon the same sheet, under a properly entitled *præcipe*, with a caption “Same v. Same,” is a valid instrument.

3. Security for costs may be signed by one partner in the name of his firm.

Judgment affirmed.

H. P. Johnson, for appellant.

G. T. M. Davis, for appellee.

Simpson v. Updegraff.

Balance v. Frisby.

Emerson v. Clark.

SIMPSON v. UPDEGRAFF.

1 Scam. R., 594.

Error to McDonough.

1. A JUSTICE has jurisdiction in a suit upon an overdue note of \$100, where the plaintiff does not claim any interest upon his demand.

2. When the facts appear in the transcript of a record, transmitted to the Supreme Court, in pursuance of an appeal or writ of error, the Supreme Court will in suits upon promissory notes enter the proper judgment, instead of remanding the cause for a new trial.

*Judgment reversed and proper one entered up.**A. Williams and Little, for plaintiff.**Browning, for defendant.*

BALANCE v. FRISBY.

1 Scam. R., 595.

Appeal from Peoria.

1. A term of court is an unit as to time, and each judicial act relates to the first day of the term.
2. An appeal from the Circuit to the Supreme Court, may be taken at any time during the term when the judgment is rendered.

FACTS.—The record shows that the judgment of the Court below was rendered on the 16th day of October, 1839; that the appellant moved for a new trial on the 23d of the same month, which was overruled on the same day; and that on the 26th of the same month, the appeal was prayed and granted. All these proceedings were had at the October term of the court below. The appellees moved to dismiss the appeal.

Per Curiam.—The appeal was prayed in due season. The practice has been uniformly to permit appeals to be prayed for at any time during the term of the court in which the judgment is rendered.

*Motion denied.**Frisby, for appellant.**Walker, for appellee.*

EMERSON v. CLARK.

1 Scam. R., 596.

Appeal from Scott.

1. AN appeal from the Circuit to the Supreme Court, in a cause where the judgment is final and amounts to \$20, exclusive of costs, or

Emerson v. Clark.

Van Horn v. Jones.

Lowry v. Bryant.

relates to a *franchise* or freehold is a matter of right upon the appellants complying with the statutory requirements.

2. The Circuit Court has no power to impose *any conditions whatever*, upon the party who demands an appeal, and offers to comply with the terms of the statute.

Appeal sustained.

W. Brown, for appellant.

Lamborn, for appellee.



VAN HORN v. JONES.

2 Scam. R., 1.

Error to the Municipal Court of Chicago.

1. It is a *debatable* question, as to the power of the Municipal Court of Chicago, to send its process beyond the territorial limits of Cook county.

2. But if it did possess that extra-territorial authority, the mode of acquiring jurisdiction, is analogous to that of the Circuit Court, when the latter tribunal undertakes to send its process to a foreign county.

3. Where a court is *limited* in power, all of the jurisdictional facts which sustain its authority must be averred in the declaration, or the proceedings will be regarded as *coram non judice*.

4. Statutes which infringe rights will be construed according to their *letter*.

5. Where rights are infringed, fundamental principles overthrown, and the general system of the laws departed from, courts will not give to *any* statute a *retrospective* operation, even where the words clearly indicate such a design; nor will such a construction be resorted to, in matters of *practice*, when the effect is to subject the citizen to great hardship or inconvenience.

Judgment reversed.

Scammon, Arnold and Ogden, for plaintiff.

Butterfield, for defendants.



LOWRY v. BRYANT.

2 Scam. R., 2.

Error to Peoria.

1. Writ of error is a writ of *right*; but,
2. A supersedeas depends upon the fact that there is "*probable cause*" which would justify the reversal of the judgment upon a fair hearing of the writ of error.
3. A supersedeas will be granted in a *doubtful* case, in order to enable the complaining party to litigate his right, and in the meantime prevent the embarrassment of an execution.

Lowry v. Bryant.

The People v. Rockwell.

Manning v. Pierce.

Per Curiam.—A *supersedeas* will be granted, when it appears upon inspection of the record, that there is probable cause for reversing the judgment of the court below. The *supersedeas* is allowed for the purpose of enabling the parties to litigate the question without prejudice to their rights, when there is probable grounds for suspending the enforcement of the execution.

Writ awarded.



THE PEOPLE v. ROCKWELL.

2 Scam. R., 3.

Motion for a Mandamus.

1. THE State is bound to pay the costs she incurs in the prosecution of her civil rights.

2. The clerk of a Circuit Court is not bound to deliver, either to the State, or a private person, an exemplification or transcript of a record of proceedings, had in the Circuit Court, unless his fees are advanced.

Motion denied.

S. A. Douglas, for relator.

Wm. Brown, for respondent.



MANNING v. PIERCE.

2 Scam. R., 4.

Appeal from the Municipal Court of Alton.

1. DEBT is the appropriate form of action upon a *replevin* bond.

2. A declaration upon a *replevin* bond is sufficient which 1, sets forth the bond and condition; 2, the proceedings in the *replevin* suit; 3, the judgment of *retorno habendo*; 4, the execution of *retorno*; and 5, assigns as a breach that the plaintiff in the *replevin* suit did not prosecute his suit with effect, and did not return the goods and chattels to the defendant in *replevin*, in pursuance of the judgment and execution.

3. Form of assigning breaches in debt upon a *replevin* bond.

THE condition of the *replevin* bond in question was, "that, whereas the above bounden William Manning had sued out of the Municipal Court of the city of Alton, county and State aforesaid, a writ of *replevin* against Nathaniel Buckmaster, for detaining the following property, to wit: one sofa, one sideboard, three looking-glasses, one high post bedstead, one wardrobe, one pair card-tables, one cane-bottom rocking-chair, six common cane-bottom chairs, one secretary, two carpets, and one dining-table, of the value of two hundred and fifty dollars. Now, if the said William Manning should prosecute said suit with effect, against said Nathaniel Buckmaster, for the above-

described property, and should hold the said coroner harmless, or make return of the property, if the same should be awarded to the said defendant, and should pay such costs as might accrue in said suit, in case of a failure in the prosecution thereof, then the bond to be void, otherwise to be in full force and effect."

The breaches were thus assigned: "And the said plaintiff in fact further saith, that afterward when the said suit of replevin came before this court for the trial thereof, to wit; at the July term of this court, and at the county aforesaid, such proceedings were had before this court, that it was considered and adjudged by the same, that the said William Manning should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy.

"And that the said Nathaniel Buckmaster should go thereof without day, and that he should have return of the goods and chattels aforesaid, as by the records and proceedings of this court more fully appears. And thereupon, there issued from the office of the clerk of this court, under the seal of this Court, a certain writ of this court, called a writ of *retorno habendo*, directed to the coroner of the county of Madison aforesaid, this plaintiff being then the said coroner, which said writ bore date the twentieth-sixth day of July, A.D. 1838, commanding the said coroner, to cause to be returned to the said Nathaniel Buckmaster, without delay, the goods and chattels aforesaid.

"And the said plaintiff in fact further saith, that the said William Manning did not prosecute his said replevin suit against the said Nathaniel Buckmaster to effect, or make return of the said goods and chattels, or any part thereof, according to the form and effect of the said condition of the said writing obligatory," etc.

A general demurrer questioned the sufficiency of the declaration.

SMITH, J.—This was an action of *debt* on an official bond given to the coroner of Madison county in an action of replevin. There are two counts in the declaration; the first merely sets out the bond, and avers the non-payment of the sum covenanted to be paid. The second assigns breaches of the condition of the bond. To these counts, the defendants in the court below, demurred separately; and they now assign for error, the decision of the court below, in overruling the demurrers, and urge, as grounds of objection, first, that an action of debt will not lie on the bond exhibited in the record; secondly, the declaration is insufficient, as there were disjunctive and alternative acts to be done, and the declaration does not contain an averment of the non-performance of those acts.

We can perceive no force in the objection as to the form of action;

Manning v. Pierce.

Shirtliff v. The People.

the action is well conceived. The declaration is considered sufficient. The covenant was to prosecute the action of replevin to effect, or to make return of the property, if it should be awarded to the defendant in the action of replevin, and pay such costs as might accrue in such suit, in case of a failure in the prosecution thereof. The breaches in the non-performance of these conditions are fully set out, as well as the averments that the action of replevin had been tried, and that a return of the property had been adjudged, and a writ of *retorno habendo* awarded. The demurrer was correctly decided.

Judgment affirmed.

Cowles and Krum, for appellants.

Geo. T. M. Davis, for appellee.



SHIRTLIFF v. THE PEOPLE.

2 Scam. R., 7.

Error to Morgan.

1. Surplusage does not vitiate a warrant issued by a justice in a criminal cause.

2. An appeal from a justice in a criminal cause must be tried *de novo*.

BROWN, J.—Information was made upon the oath of Christiana Riggs, before W. Gordon, a justice of the peace for Morgan county, that Edward Shirtliff had committed an assault and battery upon the said Christiana Riggs. The justice of the peace, before whom the oath was made, issued his warrant for the arrest of the said Edward Shirtliff. The warrant run in the name of "the People of the State of Illinois," and went on to set out the offence "as against the laws of the State, and also against the ordinances of the town of Lynville." Edward Shirtliff was brought before the justice and fined. The case before the justice was docketed in the name of the "President and Trustees of the town of Lynville v. Edward Shirtliff." The defendant appealed from the decision of the justice to the Circuit Court of Morgan county, where the court permitted the cause to be docketed and tried in this case in the name of the People v. Edward Shirtliff. Judgment was rendered against the defendant below, to reverse which this writ of error is brought. The statute giving jurisdiction to justices of the peace, of cases of assaults and of assaults and batteries, confers on the Circuit Court, where the appeal is brought, the right to try the case as an original one. So much of the warrant as states the offence to be against the corporate authorities, etc., was nothing more than surplusage, and did not vitiate it. The statute does not make a

Shirtliff v. The People.

Forsythe v. Baxter.

justice's court a court of record, but only requires him to keep a docket of the cases tried before him.

Judgment affirmed.

Lamborn, for plaintiff.

W. Brown, for defendant.

FORSYTHE v. BAXTER.

2 SCAM. R., 9.

Appeal from Peoria.

1. The statute requires, in returning foreign depositions taken in pursuance of a *dedimus potestatem commission*, that the commissioner should indorse on the sealed envelope, "*the names of the parties litigant*;" but where one firm sues another, it is sufficient to use the firm names.
2. A leading question may be propounded when it becomes necessary to direct the mind of the witness to the subject matter of inquiry.
3. Foreign laws must be pleaded and proved, but in an action upon a note made in a sister State, if the law of the *lex loci* is not averred in the declaration, the court will presume that the *lex loci* and *lex fori* concur in conclusion as to the rule of interest.
4. Where illegal evidence, *immaterial* to the issue, and which can by no possibility be regarded as *injurious*, is admitted in the court below, the appellate court will not reverse the judgment.

THIS was a suit upon a note made in Missouri. The declaration was according to the common law form in *assumpsit*. The bill of exceptions upon which the appeal hinged was substantially thus: A deposition was taken in the cause, and returned to the clerk's office, sealed up and directed to the said clerk, with the following indorsement: "*Hicks, Ewing & Co. v. Forsyth & Co.*"

The defendants in the court below excepted to said deposition, "because the names of the parties litigant were not indorsed on the deposition;" and to the second interrogatory in said deposition, "because said second interrogatory was leading and improper." It was as follows:

"Question 2d. Do you know whether the said plaintiffs, Robert Baxter, Edward D. Hicks, Henry Ewing, and Anthony W. Vanlear are doing business in company under the firm and style of Hicks, Ewing & Co., and if yes, how long have they, to your knowledge, been doing business in company as aforesaid?" The answer to this interrogatory was, "They are, and have been for about three years."

The court overruled said exceptions, and on the trial of the cause, permitted the whole of the said deposition to be read in evidence. The court also permitted the plaintiffs "to read in evidence the laws of the State of Missouri to prove that the said plaintiffs were entitled to recover interest on promissory notes, made in the State of Missouri, to which the defendants objected, because there was no aver-

Forsythe v. Baxter.

ment in the declaration that the said plaintiffs, by the laws of the State of Missouri, were entitled to claim interest on promissory notes." To each of said decisions the defendants excepted. By agreement of parties, the cause was then submitted to the court for trial, without the intervention of a jury. Judgment was rendered for the plaintiffs, from which the defendants appealed to this court, and assigned for error the decisions of the court which were excepted to.

SMITH, J.—The objection that the cause is not rightly entitled by the indorsement on the deposition, is not valid. It is substantially set forth, and sufficiently to indicate in what cause the proceedings were had. We do not perceive any objection to the question propounded in the interrogatories, and to which exception is taken as being a leading question. On the exception to reading the laws of Missouri, we are at a loss to perceive what error there was in admitting those laws to show that by those laws (the contract being there made), like under our own, the debtor was chargeable with the payment of interest on the sum expressed in the note, after the day of payment had elapsed. It did not change the rate of interest for which the debtor was liable, those laws, like ours, establishing the rate at six per centum per annum. If the laws had not been adduced, still the plaintiffs were entitled to the same rate, and consequently their introduction produced no wrong, if we suppose the Circuit Court awarded interest under those laws, and not our own. It is impossible to learn, from the decision, under which act the court decided; and the mere reading of the law of Missouri would be no ground of error.

Had the court awarded a much larger sum for interest, and had the statute of Missouri been referred to, to justify the sum allowed, it might then, perhaps, have been important to inquire whether a party could recover a greater amount of interest than that allowed by the laws of our State, without averring that by the laws of the State where the contract was made, he was entitled thereto.

Judgment affirmed.

Frisby and Metcalf, for appellants.

H. P. Johnson, for appellee.

KIRKLAND v. LOTT.

2 Scam. R., 13.

Appeal from Greene.

In an action by a vendor, against the vendee, to recover upon a note given for the purchase-money of certain real estate—a plea averring that the vendor pointed out the precise location of the land, and that upon the faith of this designation, the vendee purchased the property and gave the note, is insufficient, because no fraudulent intent was charged; but, a plea averring the fraud is a good defence.

WILSON, C. J.—The plaintiffs brought their action against the defendant upon a note executed by him to them for the sum of \$188, to which the defendant pleaded six pleas. Upon the first, which was a plea of failure of consideration generally, the plaintiffs took issue, and demurred to each of the others, and the demurrers were sustained by the court. Thereupon the defendant withdrew his first plea, and judgment was then rendered against him upon the demurrers.

This decision of the court brings up the inquiry as to the sufficiency of the pleas demurred to. The first plea was withdrawn. The second plea alleged, in substance, that the defendant bargained with the plaintiffs for the purchase of three lots of ground in the town of Jerseyville, by their numbers, for which he executed the note declared on; and at the time the contract was made the plaintiffs pointed out and showed to the defendant the location and situation of the said lots; and that he bargained for the lots so pointed out and shown, but that the lots as numbered on the plat of said town do not include the ground purchased, nor are the said lots located at the place pointed out and shown by the plaintiffs. The defendant further averred that the plaintiffs knew at the time of the sale of said lots, that they were not situated at the place pointed out and shown, and that the knowledge of this fact was by them fraudulently concealed from the defendant. The defendant also avers that since the sale of the lots to him, the plaintiffs have sold and conveyed the same lots to another, whereby they are unable to convey them to him; wherefore the consideration has failed. The fourth plea also charges that the plaintiffs falsely and fraudulently represented the lots to be on a high piece of ground on one of the principal streets in the town, and that they pointed out their location; and that the defendant, relying upon the representations so made, purchased the said lots, whereas the said lots were not so situated, etc.

This plea differs from the second only in form, and in not alleging the lots to have been purchased by their numbers. The third, fifth,

and sixth pleas are essentially alike, and all allege a want of consideration for the same reasons assigned in the second and fourth pleas; but neither of them charges the plaintiffs with fraudulently or knowingly misrepresenting the situation of the lots sold to the defendant. The omission in each of these pleas to charge the plaintiffs with fraud in the transaction, is a fatal defect. Without this allegation they do not constitute a defence to the action. The demurrers to them were therefore properly sustained. The second and fourth pleas are not very technically drawn, but they charge in terms sufficiently clear, that the lots which the plaintiffs pointed out and showed to the defendant, and which he purchased upon their representation as to their location, and upon his own view of them as pointed out, were not designated upon the plat of the town by the numbers which the plaintiffs represented them to be; and that the representations respecting their location and numbers were made with the knowledge of their falsehood, and with a fraudulent intention.

The demurrer to these pleas admits the truth of all the allegations they contain. It is manifest, then, that the plaintiffs have, by false and fraudulent acts and representations, deceived the defendant and induced him to believe that he was purchasing lots in one part of the town, when, according to the plat of the town, they were situated in a different and less eligible part of it. It is well known that the disparity in the value of town lots is often very great; and that that disparity is owing principally to their location.

If the mistake relative to the situation of those lots had been mutual, or if the plaintiffs had made no false representations, nor used any means to deceive the defendant, he would have had no ground of defence. If the plaintiffs had made no representations as to the location of the lots, the defendant would reasonably have sought, and might have obtained, correct information from some other source; and it is not for the plaintiffs to say that it was his folly not to have done so, when their representations were the cause of his omission. Credulity on his part, is no excuse for fraud on theirs.

I do not however consider the defendant chargeable with any culpable degree of confidence or want of circumspection. The statements of the plaintiffs, and the pointing out the situation of the lots, were such practices of deception as might well mislead and deceive a more than ordinarily cautious man; and when accompanied with the intention so to deceive, as is alleged, were certainly such as to vitiate the contract which they beguiled the defendant into making. The demurrers to the second and fourth pleas were therefore improperly sustained. The judgment is reversed with costs, and the cause re-

Kirkland v. Lott.

Lawrence v. Yeatman.

Mitcheltree v. Stewart.

manded with directions to the Circuit Court to try the cause agreeably to this decision.

Judgment reversed.

W. Thomas, for appellant.

Cowles, for appellee.

LAWRENCE v. YEATMAN.

2 Scam. R., 15.

Error to St. Clair.

1. A writ of attachment, which neither designates the court from whence it emanated, or to which it is returnable, or omits to state the return day, is void.
2. An attachment bond is void which omits to recite the court in which it is to be filed, and from whence the attachment issued.
3. Proceedings, where they are *ex parte—in rem*—and originate under statutes in derogation of the common law, must be strictly construed.

SMITH, J.—This was a proceeding under the attachment laws against the plaintiff in error as a non-resident debtor.

Several objections have been urged against the regularity of the proceedings in the Circuit Court. Without noticing any other than that relating to the insufficiency of the attachment bond, it will be apparent that the objection urged against the bond must prevail. The recital in the condition of the bond is essentially defective in that portion of it which attempts to describe the attachment, and the return of it. It describes no court from which it has been issued, nor to which it is to be returned, nor the term to which it is made returnable. It is consequently so wholly uncertain that it may be well doubted whether an action could ever be maintained on it, in case of a breach of its condition. The proceedings, however, being *ex parte* and *in rem*, and the judgment being by default because of no appearance by the defendants, the rule which requires a strict conformity to the statute modes of proceeding, must prevail.

Judgment reversed.

Lyman Trumbull, for plaintiff.

Cowles, Krum and Scammon, for defendant.

MITCHELTREE v. STEWART.

2 Scam. R., 17.

Appeal from Schuyler.

1. A *scire facias* to foreclose a mortgage. (*a*)
2. The form of the writ becomes a precedent.
3. The legality of the service and return sustained.
4. Appearance cures a want of service or a defective return.

Mitcheltree v. Stewart.

THIS was the writ and return thereon :

“State of Illinois, Schuyler County, ss.

“The People of the State of Illinois to the Sheriff of Schuyler County, greeting. Whereas Isaac Stewart and James E. Pearson, merchants, trading under the firm of Isaac Stewart—and Pearson, of the city of Louisville, and State of Kentucky, by Browning and Worthington, their attorneys, have filed in the clerk’s office of our Circuit Court in and for said county of Schuyler, and State of Illinois, a certain deed of mortgage, which said deed of mortgage is duly executed and recorded in the Recorder’s office in and for said county and State, according to the statute in such case made and provided. And whereas the said Isaac Stewart and James E. Pearson, by their attorneys aforesaid, have filed in the said clerk’s office a præcipe directing a writ of *scire facias* to be issued upon said deed of mortgage, which said deed of mortgage is in the words and figures following, to wit:” [Here the mortgage is set out in *hæc verba*, by which it appears that the mortgage was made to the plaintiffs to secure the payment of a promissory note for \$654 59, due to the plaintiffs; a book account amounting to \$393 76, due to Neff, Wanton, & Co.; and three notes, in the aggregate, for the sum of \$662 89, due to Muir & Wiley—the amounts paid upon the mortgage to be applied *pro rata* in extinguishment of the several debts. A certificate of acknowledgment before the clerk of the Schuyler Circuit Court, and a certificate of the Recorder of Schuyler county, certifying that the mortgage was duly recorded, were annexed to the copy of the mortgage in the writ, but there was no averment that the same was acknowledged or recorded. The mortgage was executed by Mitcheltree and wife.]

“By virtue of which said deed of mortgage, above recited, and the conditions therein contained, and according to the tenor and effect of the notes and accounts therein specified and described; it appears that the said John Mitcheltree is indebted to the said Isaac Stewart and James E. Pearson in the sum of one thousand seven hundred and eleven dollars and twenty-four cents, together with interest thereon according to the tenor and effect of said notes and accounts, and according to the provisions of the statute in such case made and provided.

“We therefore command you that you summon the said John Mitcheltree, if he shall be found in your county, to be and appear before the Circuit Court of said county of Schuyler and State of Illinois, on the first day of the next term thereof, to be holden at the court house in Rushville, on the first Monday in the month of November next (A.D. 1837), to show cause, if any he have, why judgment should not be rendered against him, for the said sum of one thousand

Mitcheltree v. Stewart.

seven hundred and eleven dollars and twenty-four cents., together with interest as aforesaid, which appears to be due and owing from the said Mitcheltree to the said Isaac Stewart and James E. Pearson, by virtue of said mortgage and the conditions therein contained, and according to the tenor and effect of the notes and accounts therein mentioned and expressed. And have you then there this writ.

“Witness Robert A. Glenn, Clerk of our said Circuit Court, at Rushville, this twenty-first day of October, in the year of our Lord one thousand eight hundred and thirty-seven.



“ROBERT A. GLENN, *Clerk.*”

And afterward, to wit, on the first day of November, A.D. 1837, the said writ of *scire facias* was returned by the sheriff of said county of Schuyler, with the following indorsement thereon, to wit :

“Executed the within as the law directs, by reading and delivering to defendant a true copy.

“THOS. HAYDEN, S. S. C. Ill.,

“By RICHARD DOUGHERTY, *Dept.*

“NOVEMBER 1st, 1837.”

The proceedings in the action were as follows : “On the calling of the cause for trial, the defendant, by his attorney, entered a motion to quash the return of the sheriff on said writ, which being considered by the court, was overruled ; and thereupon the defendant moved to quash the writ in said cause, for a variance between the writ and mortgage, which motion was overruled by the court. Defendant then offered to plead to the merits, and asked time to write and file his plea herein, which was not allowed. And thereupon judgment was entered by default against the defendant,” who excepted to the several decisions of the court.

Judgment was entered for \$2,218 96. Thereupon an attorney for the defendant made affidavit that the motions were made by mistake ; that no appearance was intended to be entered by the defendant, and no appearance was in fact entered ; and that the defendant was entitled to a credit of \$1,400. The plaintiffs then remitted \$1,452 50, and took judgment for the balance, \$766 46 and costs. The cause was heard at the June term, 1838, of the Schuyler Circuit Court, before the Hon. James H. Ralston.

The defendant appealed to this court, and assigned for error the decisions of the court below.

SMITH, J.—Three grounds have been assigned for error in this cause, to wit : That the Circuit Court erred in refusing to quash the sheriff’s

Mitcheltree v. Stewart.

Harrison v. Singleton.

return to the writ of *scire facias*; to quash the writ itself; and in rendering judgment in the action. We perceive no error in the decision of the Circuit Court on the points made. The sheriff's return appears to be full and formally correct.

The writ is conceived to be sufficiently full and descriptive of the cause of action; and as it recites the mortgage, we do not consider that there can be any valid objection to it. As to the rendition of the judgment, and the application to set it aside, full and entire justice has been done in the cause; and the amount claimed by the defendant having been allowed, and judgment entered only for the amount admitted by him to be actually due, we are of opinion that the court did not err in refusing to set aside the default.

Judgment affirmed.

A. Williams, for appellant.

Browning, for appellee.

(a) *The Statute*.—Cooke's Stat., 976. Decisions: *Marshall v. Maury*, 1 Scam. R., 232; *State Bank v. Moreland*, Bre. R., 220; *Menard v. Marks*, 1 Scam. R., 25; *Day v. Cushman*, *ibid.*, 475; *State Bank v. Wilson*, 4 Gilm. R., 60; *Woodbury v. Manlove*, 14 Ill. R., 213; *McCumber v. Gilman*, 13 *ibid.*, 543; *Scott v. Moore*, 3 Scam. R., 317; *Gilbert v. Maggord*, 1 *ibid.*, 471; *McFadden v. Fortier*, 20 Ill. R., 509; *Rockwell v. Jones*, 21 *ibid.*, 279.

HARRISON v. SINGLETON.

2 Scam. R., 21.

Appeal from Monroe.

1. AN appeal lies, from the Circuit to the Supreme Court, *only* upon *final* judgments. (a)

2. A claimant in a trial of the right of property cannot object to the legality of the execution. His remedy is replevin, trespass, or trover, if the *fi. fa.* is void or irregular. (b)

3. A PROBATE justice of the peace may issue an execution for a sum not exceeding \$100, to any constable of his county.

4. The jurors in the Circuit Court upon the trial of an appeal from a right of property ~~proceeding~~, need not sign their verdict.

Appeal dismissed.

Reynolds, Shields and Kærner, for appellants.

L. Trumbull, for appellee.

(a) *S. P. Pentecost v. McGhee*, 4 Scam. R., 327; *Fleece v. Russell*, 18 Ill. R., 33; *Hayes v. Caldwell*, 5 Gilm. R., 83; *Gillett v. Stone*, 1 Scam. R., 543.

Vide, in this connection, *Cornellus v. Coons*, Bre. R., 15; *Sloc v. State Bank*, 1 Scam. R., 423.

(b) *Vide* Cooke's Stat., 1114.

Towell v. Gatewood.

TOWELL v. GATEWOOD.

2 SCAM. R., 22.

Appeal from Pope.

1. A bill of sale and a receipt of the purchase money is only *prima facie* evidence, and may be explained by *parol*.
2. A warranty upon the sale of a chattel must be made at the time of the sale, or if made subsequently, must be based upon a new consideration.
3. A vendee of a chattel cannot recover damages for a defect in the thing purchased, unless the vendor made a false representation as to a fact, or warranted the article sold.
4. A mere opinion as to the class or quality of the thing sold, made by a vendor in a bill of parcels, does not constitute a warranty.
5. No particular form of words are requisite to constitute a warranty in the sale of chattels, but the vendor must affirm a fact upon which the vendee relied, which turns out not to be true in point of fact. (a)

WILSON, C. J.—This was an action by E. H. Gatewood, the plaintiff below, against the defendants, H. and I. Towell, upon an alleged warranty of a lot of tobacco sold by them to the plaintiff. The allegations in the declaration are that the defendants undertook and promised that the tobacco was of good first and second rate quality, and that it was not of those qualities. Upon the trial of the cause the plaintiff read in evidence the following paper:

“NEWHAVEN, February, 1836.

“Mr. E. H. Gatewood bought of H. and I. Towell, 2,951 lbs. good first and second rate tobacco at \$4 50, \$132 79½. Received payment by the hands of I. Kirkham,

“HENRY TOWELL,
“ISAAC TOWELL.”

He also proved by parol testimony that the tobacco was not good first and second rate tobacco, and there rested his case.

The defendants then offered to prove by a witness who was present at the sale, the terms of the contract; but the court rejected this testimony, and upon the evidence given by the plaintiff, the jury found for him the whole amount paid for the tobacco. The errors assigned are, the refusal of the court to permit the defendants to give parol evidence of the contract in relation to the tobacco; the admitting a certain deposition to be read in evidence; and the refusal of a new trial upon the application of the defendants.

The opinion of the court upon the first assignment of error, supercedes the necessity of expressing any opinion upon the others. It is to be inferred from the record and argument of counsel, that the court rejected the parol testimony offered by the defendants, upon the ground that the paper read in evidence by the plaintiff, was a written contract between the parties, and could not therefore be contradicted or changed by parol evidence. If the premises assumed by the court

were correct, its conclusion would likewise be so ; but I cannot consider the paper in question as containing the evidence of the bargain entered into by the parties. It does not profess to be such. It possesses none of the constituent parts of a contract ; but is in form and in fact a bill of parcels, and an acknowledgment of the receipt of the purchase-money, and as such was properly received in evidence ; but it does not follow that because it is evidence so far as it goes, that it is all the evidence that ought to be received. Under such a rule, no latent ambiguity could be explained by parol ; and although the defendants could prove, as in this case they contend they could, that the writing claimed by the plaintiff to be the contract of sale, was merely a receipt given some time after the sale, and that at the time of sale there were no stipulations as to the quality of the tobacco, yet the rule adopted by the court would exclude such proof. This would be as palpable a violation of law as of justice.

The evidence proposed to be given by the defendants, without contradicting the writing, would, by showing it to be nothing more than a receipt given subsequently to the contract, exonerate them from all liability on account of any supposed warranty contained in the paper ; as it is essential to the validity of a warranty, that it should be made at the time of sale, or if made afterward, that it be upon a new consideration.

As this case has to be remanded for further proceedings, it becomes necessary to decide upon the legal effect of the bill of particulars given by the defendants, supposing it to be unexplained by any parol or other testimony. In an action by the purchaser, to recover the purchase-money paid or damages on the sale of any article or commodity, on the ground that it is inferior in quality to what it was represented to be, it is necessary to allege and prove either fraud or an express warranty ; and as there is no charge of fraud in this case, the only question is, whether the bill of the defendants, which states the tobacco sold by them to the plaintiff, to be first and second rate, is to be considered as a warranty that it is of those qualities. No particular words or form of expression is necessary to create a warranty, but there is a distinction as to the legal effect of expressions when used in reference to a matter of fact, and when used to express an impression or opinion. Where the representation is positive, and relates to a matter of fact, it constitutes a warranty ; as that a ship is an American or a French ship, or that the crew consists of so many hands. But where the representation relates to that which is a matter of opinion or fancy, as, for example, the value of a horse or painting, in such cases the representation is to be regarded as an expression of

Towell v. Gatewood.

Owens v. Derby.

opinion, rather than such a verification of a fact as will amount to a warranty, unless that idea is excluded by an express warranty, or such other declaration as leaves no doubt of the intention to make a warranty. The declarations of the defendants in this case, as to the quality of the tobacco, would seem to be analogous to the latter class of cases. The quality of the tobacco was a matter of judgment, and a matter with respect to which there may be a great diversity of opinion, particularly among those who are not well acquainted with the article. The defendants are not charged with having used any fraud or deceit, nor does it appear that they were acquainted with the article of tobacco, or that the plaintiff relied upon their judgment. As, therefore, the quality of tobacco is a matter rather of opinion, the defendants describing that sold by them as good first and second rate, unaccompanied with any other assurance of quality, can only be regarded as what in their opinion was its appropriate designation, and not as an undertaking or warranty of its quality, upon which an action will lie.

*Judgment reversed.**Gatewood, Eddy and Webb, for appellant.**David J. Baker, for appellee.*

(a) WARRANTIES.—1. *Express*, *Adams v. Johnson*, 15 Ill. R., 845; *Hawkins v. Berry*, 5 Gilm. R., 86; *Endor v. Scott*, 11 Ill. R., 85.

2. *Implied*.—*Misner v. Granger*, 4 Gilm. R., 69; *Freeman v. Guyer*, 18 Ill. R., 652; *Snow v. Baker*, 8 Gilm. R., 260.

OWENS v. DERBY.

2 Scam. R., 26-28.

Appeal from Hancock.

1. In actions of tort, the jury may find one of several defendants guilty and discharge the others.

2. Where there is no proof against one of two defendants in trespass *vi et armis*, it is not the duty of the court to instruct the jury to find a verdict as in case of a *nonsuit*.

3. But the court may instruct the jury to find a verdict for that defendant against whom no evidence exists.

*Judgment affirmed.**Little and Williams, for appellants.**Walker, for appellee.*

Ballentine v. McDowell.

Merriwether v. Smith.

BALLENTINE v. McDOWELL.

2 Scam. R., 28-30.

Appeal from Wabash.

1. A VERDICT and judgment in *assumpsit*, for use and occupation, cannot be sustained by an appellate court where the bill of exceptions which purports to set out the evidence does not show—

- (1.) That the relation of landlord and tenant existed.
- (2.) The length of time the premises were occupied.
- (3.) The sum agreed to be paid for, or the value of the use.

2. Where the record in such a case shows that the tenant entered under a stranger, and a contract to rent of the plaintiff is not proved, the action cannot be sustained.

3. In such an action, an offer to hire the premises, and a refusal to pay the rent proposed, does not establish the relation of landlord and tenant.

*Judgment reversed.**Webb*, for appellant.*Ficklin*, for appellee.

MERRIWETHER v. SMITH.

2 Scam. R., 30-32.

Appeal from Greene.

1. A plea of failure of consideration to an action on a note, which sets forth two distinct grounds of failure, is bad for duplicity.
2. A plea of failure of consideration, which is uncertain in its allegations of fact, is bad on general demurrer.
3. A demurrer in short, filed by consent, treated as valid.
4. Debt v. three—service on two only—the defendants thus served, appeared and pleaded in bar—judgment upon demurrer to plea against all—held erroneous.
5. Where in an action *ex contractu* the plaintiff takes judgment against all of the defendants, one of whom was not served with process, the judgment will be reversed; but the Supreme Court will remand the cause, with instructions to enter judgment against those served, and award a *set. fa.* as to the party not served.

THIS was an action of *debt* brought on a promissory note in favor of Smith, for the use of Gregory, against Merriwether, Richard B. Hill, and Robert L. Hill. The summons was served on Merriwether and Robert L. Hill, and returned not found as to Richard B. Hill. The defendants, Merriwether and Robert L. Hill, pleaded specially that Smith represented to them that he was the owner in fee simple of a certain lot of land, and that if the defendants would execute the note declared on, he would make a good and perfect title to said lot of land, as soon as the note was executed. That they executed the note in consideration of the promise of Smith to make them a good and sufficient deed for said lot of land; and they aver that he did not,

Merriwether v. Smith.

Holbrook v. Peoria Bridge Co.

at the time of making the note, or at any time thereafter, make a good and sufficient deed for said lot; and in truth and in fact the said Smith had no title whatever to said lot of land. Wherefore, the consideration of said note had wholly failed.

To this plea Smith demurred in short, by consent, and the defendants below joined in demurrer. The court below sustained the demurrer, and gave judgment against all three of the defendants.

Lockwood, J.—The assignment of errors questions the correctness of the decision in sustaining the demurrer, and in rendering judgment against Richard L. Hill, who had not been served with process, and had not appeared. The plea was clearly bad. It is double, in this, that it alleges that plaintiffs did not convey the lot by a good and sufficient deed, and that he had no title to convey. The plea is also uncertain, in this, that it is doubtful whether the defendants do not base their allegation that the plaintiff did not execute a good and sufficient deed for the lot, because he had no title to convey. If a deed of any kind was executed, that fact should have been distinctly set forth; and if it contained no covenants of title, then in the absence of fraud, the question of title would have been at the risk of the grantee; and if covenants had been inserted in the deed, it would have been incumbent on the grantee to have relied on them. The court consequently decided correctly in overruling the special plea. It was, however, error in giving judgment against Richard L. Hill. For this error, the judgment is reversed with costs, and the cause remanded with directions to enter judgment against the defendants who were served with process, and to enter an order to enable the plaintiff below to take out a *scire facias* against the defendant not served.

Judgment reversed.

Hardin and Doyle, for appellant.

S. T. Logan, for appellee.



HOLBROOK v. PEORIA BRIDGE CO.

2 SCAM. R., 32.

Error to Peoria.

1. A CORPORATION cannot sue and cause the process to be directed to and executed in a foreign county, unless the facts exist or are averred, which justify such a proceeding.

2. The statute relative to suing a defendant out of the county where he resides or is found, unless the cause of action accrued or was

Holbrook v. Peoria Bridge Co.

Warren v. McHatton.

specifically made payable in the county of the plaintiff, applies to corporations as well as natural persons. (a) *Judgment reversed.*

Peters, for plaintiff.

Frisby and *Metcalf*, for defendants.

(a) S. P. Cooke's Stat., 722, sec. 29 : *Betts v. Menard*, Bre. App., 10; *Schuyler v. Mercer*, 4 Gilm. R., 20.

WARREN v. MCHATTON.

2 Scam. R., 32-33.

Error to Schuyler.

1. THE common law power of the Circuit Courts of this State, to order the amendment of their process and records, and of the pleadings and other written acts of the suitors, is a discretionary authority, and their decisions in exercising it will not ordinarily be reviewed in, and reversed by, the Supreme Court. (a)

2. The refusal of the Circuit Court to permit the amendment of a petition and summons cannot be assigned for error.

Judgment affirmed.

(a) The decisions of the Supreme Court are apparently conflicting, relative to the doctrine of amendments, but may be defensible upon the grounds, that all general rules are subject to equitable exceptions, and upon Judge Marshall's maxim, "the binding authority of a judicial decision is co-extensive only with the facts upon which it was founded; all else is *dicta*."

The following cases affirm the general rule of the text: *Phillips v. Dana*, 1 Scam. R., 498; *Lansing v. Birge*, 2 *ibid.*, 875; *Riggs v. Savage*, 3 Gilm. R., 453; *Campbell v. Head*, 13 Ill. R., 126; *McBain v. Enloe*, *ibid.*, 80.

ILLUSTRATIONS :

1. Clerical errors in the form of *original* process may be amended: *State Bank v. Buckmaster*, Bre. R., 133; *Harris v. Jenks*, 2 Scam. R., 476; *Moss v. Flint*, 13 Ill. R., 571; *Norton v. Dow*, 5 Gilm. R., 461; *Thompson v. Turner*, 22 Ill. R., 389.

2. Amendments in matters of form of *mesne* and *final* process are also permitted: *Nomaque v. People*, Bre. R., 109; *Bybee v. Ashby*, 2 Gilm. R., 167; *Hargrave v. Penrod*, Bre. R., (App.) 16.

This rule extends to special proceedings under the statute in relation to tax proceedings, *eo. gr.*, the precept for the sale of land for the non-payment of taxes may be amended: *Atkins v. Hinman*, 2 Gilm. R., 451; *S. P. Pitkin v. Yaw*, 13 Ill. R., 251; *Young v. Thompson*, 14 *ibid.*, 380.

And also to the *venire* in criminal causes: *Nomaque v. People*, Bre. R., 109. *S. P. Gowkoski v. People*, 1 Scam. R., 476.

A void writ cannot be amended: *Ellis v. Eubanks*, 3 Scam. R., 190; *Bybee v. Ashby*, 2 Gilm. R., 167.

3. The "returns" to process are amendable by the officer who executed the writ, with the permission of the court out of which the precept issued: *Moore v. People*, 3 Gilm. R., 149; *Morris v. School Trustees*, 15 Ill. R., 269; *Johnson v. Donnell*, *ibid.*, 100; *Montgomery v. Brown*, 2 Gilm. R., 584-5; *Bellingall v. Gear*, 3 Scam. R., 575; *James v. Hughill*, 2 *ibid.*, 861; *Eyster v. Eyster*, 14 Ill. R., 369.

4. Amendment of Affidavits :

(1.) An affidavit in attachment causes is not amendable upon common law principles: *Clark v. Roberts*, Bre. R., 222.

But by statute it is now permitted: *Cooke's Stat.*, 229, sec. 8. *Micee v. Brush*, 3 Scam. R., 23; *Campbell v. Whetsone*, 3 Scam. R., 361.

And this rule extends to affidavits upon which an attachment of vessels is based: *Frank v. King*, 4 Scam. R., 150.

(2.) An affidavit upon which a replevin writ issues, may also be amended on common law principles: *Frink v. Flanagan*, 1 Gilm. R., 38.

(3.) An affidavit for a continuance cannot be amended; at least, such a course of practice is discountenanced: *McBain v. Enloe*, 13 Ill. R., 76.

5. Appeal bonds in criminal causes not amendable at common law: *Swafford v. People*, 1 Scam. R., 269; *Walsh v. People*, 12 Ill. R., 77; *Stevens v. People*, 13 *ibid.*, 132.

Warren v. McHatton.

Ogden v. Brown.

So of a bond upon appeals from the Probate Court: *Crain v. Bailey*, 1 Scam. R., 322. But the exercise of the power is discretionary, and if the Circuit Court permit an amendment, the Supreme Court will not reverse the order.—*Ibid.*

So of the appeal bond in forcible entry and detainer causes: *Harlan v. Scott*, 2 Scam. R., 66.

By statute, bonds upon appeals from justices of the peace are amendable: *Hubbard v. Freer*, 1 Scam. R., 467; *Bragg v. Fessenden*, 11 Ill. R., 546; *Dedham v. Barber*, 1 Scam. R., 255; *Boorman v. Freeman*, 12 Ill. R., 165; *Trustees v. Starbird*, 13 *ibid.*, 49.—*Cooke's Stat.*, 709, sec. 65.

But the appellee cannot, on his application, obtain the amendment; his remedy is to move for a dismissal of the appeal: *Young v. Mason*, 8 Gilm. R., 57.

An appeal bond, in cases of appeal from the Circuit Court to the Supreme Court, cannot be amended in the appellate court: *Gillilan v. Gray*, 13 Ill. R., 705.

6. Attachment bonds not amendable at C. L., but a special statute permits an amendment: *Clark v. Roberts*, Bre. R., 222; *Cooke's Stat.*, 229, sec. 8; *Hunter v. Ladd*, 1 Scam. R., 551; *Lea v. Vail*, 2 *ibid.*, 473.

7. Amendments of Pleadings:

(1) Declaration.

In ejectment, by adding a new demise: *Chapin v. Curteneus*, 15 Ill. R., 427; *Hill v. Leonard*, 4 Scam. R., 142.

Change of parties: *Lake v. Morse*, 11 Ill. R., 589; *Thompson v. Schuyler*, 2 Gilm. R., 271.

Ordinary amendments of the declaration: *Pickering v. Pulsifer*, 4 Gilm. R., 79; *Dougherty v. Purdy*, 13 Ill. R., 206.

In cases of misjoinder of causes of action: *Martin v. Russell*, 3 Scam. R., 848.

By adding the jurisdictional facts: *Wakefield v. Gondy*, 3 Scam. R., 184.

In cases of misnomer of defendant, after plea in abatement: *Peters v. Heslep*, 3 Scam. R., 45.

(2) Of *sci. fa.* to foreclose mortgage, which constitutes a pleading as well as the process: *Marshall v. Maury*, 1 Scam. R., 232; *State Bank v. Buckmaster*, Bre. R., 133.

(3.) Amendments of pleadings upon the trial: *Miller v. Metzger*, 16 Ill. R., 445.

8. Amendment of Records:

(1.) During the term when the proceeding took place: *Stahl v. Webster*, 11 Ill. R., 515; *Frink v. King*, 3 Scam. R., 149.

(2.) After a term intervenes: *Atkins v. Hinman*, 2 Gilm. R., 451; *Lyon v. Bolvin*, 2 Gilm. R., 629; *O'Connor v. Mullen*, 11 Ill. R., 59 and 118; *Lampsett v. Whitney*, 3 Scam. R., 170; *Robb v. Bostwick*, 4 *ibid.*, 116; *Conaghron v. Gutchens*, 18 Ill. R., 390. But notice is essential: 11 Ill. R., 59 and 118; 18 Ill. R., 390.

(3.) Amendment ordered by Supreme Court: *Duncan v. McAfee*, 8 Scam. R., 93; *Mitcheltree v. Sparks*, 1 *ibid.*, 122.

(4.) Amendment of verdicts: *Hinckley v. West*, 4 Gilm. R., 138; *Cook v. Scott*, 1 *ibid.*, 333; *Wilcoxon v. Roby*, 3 *ibid.*, 475; *Caswell v. Cooper*, 13 Ill. R., 532.

(5.) Amendment of decree in equity: *Williams v. Waldo*, 3 Scam. R., 265.

(6.) Entry of judgments *nunc pro tunc*: *Loomis v. Francis*, 17 Ill. R., 206.

9. Amendment of bills in equity: *White v. Morrison*, 11 Ill. R., 366; *Drouillard v. Baxter*, 1 Scam. R., 191; *Rowan v. Kirkpatrick*, 14 Ill. R., 1; *Tarleton v. Vietes*, 1 Gilm. R., 474; *Burke v. Smith*, 15 Ill. R., 158; *Jefferson County v. Ferguson*, 13 *ibid.*, 85; *McArtee v. Engart*, 13 *ibid.*, 249.

10. General principles relative to amendments:—

(1.) There must be something to amend by: *Lake v. Morse*, 11 Ill. R., 589; *Conaghron v. Gutchens*, 13 *ibid.*, 390.

(2.) The adverse party must have notice of a motion to amend: 11 Ill. R., 59 and 118; 13 *ibid.*, 390.

(3.) Where amendments are allowed, it is not proper to interline the pleadings; they should be re-written, or the amendment attached to the original by means of a separate sheet of paper: *Waterford v. Fishback*, 3 Scam. R., 176.

OGDEN v. BROWN.

2 Scam. R., 33-34.

Error to Cook.

1. At common law, in actions *ex contractu*, against several, all must be served, or proceedings in outlawry had, before a judgment could be rendered.

2. But by our statute, where one or more are served and one or

Ogden v. Brown.

Cole v. Chapman.

more are not, judgment may be rendered against those in court, and the plaintiff may then proceed by *sci. fa.* to make those not served parties to the judgment.

3. Where judgment is rendered against all in such a cause, when all have not been served, the judgment will be reversed.

4. But the Supreme Court will remand the cause with instructions to render judgment against the parties in court with leave to plaintiff to proceed by *sci. fa.* as to the others.

Judgment reversed.

Butterfield, Arnold and Ogden, for plaintiffs.

Spring and Goodrich, for defendant.



COLE v. CHAPMAN.

2 Scam. R., 34-35.

Error to Cook.

1. In debt, upon an arbitration bond, the declaration need not aver that the writing obligatory was signed by both parties.

2 But in an action upon an award, a mutual submission to arbitration must be averred.

SMITH, J.—This was an action of *debt* on an arbitration bond. The defendant demurred to the declaration in the Circuit Court, and the demurrer was sustained, and judgment rendered for the defendant.

We have examined the declaration minutely, and do not perceive the declaration to be defective. The exception that the bond was not signed by both the parties, is not a sufficient ground for adjudging the declaration bad. There are two counts in the declaration which set forth the bond and condition with sufficient certainty. The first count sets forth the substance of the award; and the second the award in *hæc verba*. When the action is upon an arbitration bond, it is only necessary to show that the award was made in pursuance of the condition of the bond, and that the defendant has not performed. But the rule is different where the defendant submits to the award of arbitrators by bond, and the action is on the award itself. In that case it is necessary to state in the declaration a mutual submission; because the award which is the foundation of the action, being the determination of a third person between two others, who submit their differences to his decision, it is the submission which creates the obligation to abide by that determination; and in that case it is not sufficient to state in the declaration that the defendant by bond submitted himself to the award of the arbitrators.

Judgment reversed.

Caton, for plaintiff.

Spring, for defendant.

Hoxey v. Macoupin County.

Cross v. Bryant.

HOXEY v. MACOUPIN COUNTY.

2 SCAM. R., 36.

Error to Macoupin.

IN debt against several, all of whom have been served, the judgment must be against all or none. Thus, where A sued B, C and D, and all of the defendants were served with process, and A alone appeared and pleaded to the action, and judgment rendered against him alone without noticing the rest—the judgment was reversed, and remanded with special instructions, etc.

*Judgment reversed.**Greathouse and Walker*, for plaintiff.*Logan and D. A. Smith*, for defendants.

CROSS v. BRYANT.

2 SCAM. R., 36-44.

Error to Peoria.

1. Assignment for the benefit of creditors sustained. (*a*)
2. Parol evidence is inadmissible to prove an assignment of goods, chattels, etc., for the benefit of creditors, when the deed of assignment is in the possession or power of the party claiming under it.
3. Where a written instrument is produced in an inferior court, and is objected to *generally*, on writ of error, the Supreme Court will not intend that the objection was sustained because the execution of the document was not technically proved.
4. It is not immoral or illegal for a debtor to prefer one or more of his creditors.
5. A debtor may assign all of his estate to a trustee for the benefit of his creditors, or any one of them standing in a confidential relation to him.
6. A deed of assignment to pay: 1, the expenses and costs of the trust; 2, to pay certain preferred creditors in full, upon the condition that they execute or assent to the deed within sixty days; 3, to pay the other creditors in full, or *pro rata*, provided they assent to the assignment within said sixty days; and, 4, to pay the surplus to the assignor, IS LEGAL.
7. The fact that three creditors are omitted, because they have prior liens, does not render the assignment illegal.

TRESPASS, *de bonis asportatis*, for 80,000 feet of lumber of the value of \$2,000—commenced by Cross against the defendants. The plea was in substance, that Bryant was the sheriff of Peoria county, that he had an execution in his hands against Johnson and Pierce, that the latter were owners, and entitled to the possession of the said lumber. To this plea the plaintiff replied property in himself, upon which issue was joined, and the cause tried before a jury. A verdict and judgment was rendered for the defendants. The plaintiff sued out a writ of error. The particular facts were embodied in a bill of exceptions in these words: "The defendants, to maintain the issue on their part, introduced evidence to prove that the property mentioned in the plaintiff's declaration, was in the possession of William Pierce

Cross *v.* Bryant.

and Simeon Johnson, partners in trade under the firm of Johnson and Pierce, a short time before it was taken by the defendants, and that the said Johnson and Pierce were then the owners thereof. To show property in himself, the plaintiff called the said Pierce as a witness, who testified that on the 7th of April, 1838, said property was sold to the plaintiff, and that on the morning of the 9th of April, he went with the plaintiff to the place where the property then was, and delivered it to him, together with the other property which was sold at the same time, except some hogs which could not be delivered, as they were then running at large in the woods; and the plaintiff then immediately constituted said Pierce his agent to attend to his property as hereafter mentioned, said agency having been agreed upon on the 7th of April aforesaid. Said Pierce further testified, that the said property was sold to the plaintiff in trust for the creditors of the said Johnson and Pierce. Said witness also testified that said lumber was made at the saw-mill of said Johnson and Pierce, about two miles distant from the place where it then was, it then being at a public landing-place in the town of Detroit, in the county of Peoria, and a large part of it formed into a raft in the Illinois River; that the said witness having been appointed agent for the plaintiff as aforesaid, as such agent took charge of said lumber and went on to complete the raft, for the purpose of taking it down said river for the plaintiff, to Peoria, and he proceeded so to do; but on the same day, before the lumber was removed by the witness, it was taken by the defendants. In answer to a question by defendants' counsel, the witness stated that said sale was by a deed of assignment from Johnson and Pierce to the plaintiff, of the said property, made on the 7th day of said April; whereupon the judge, on motion of the defendant, excluded so much of the evidence of the witness, as related to the sale of said property.

The plaintiff offered to introduce a deed of assignment of the property from Johnson & Pierce to the plaintiff, in trust for their creditors, which was objected to, and the deed rejected.

The deed was an indenture of three parts. Johnson & Pierce of the first part, said Cross of the second part, and William Miller and others, creditors of said Johnson & Pierce, who should execute the indenture within sixty days, of the third part, and was dated April 7th, 1838.

This deed conveyed the property in question, upon trust that Cross should immediately take possession of it, and at public or private sale, sell it, and appropriate the proceeds as follows, viz.:

1. To pay costs of the assignment and expenses of the execution of the trusts.

2. To pay certain creditors named the full amount of their debts, if they should execute the deed within sixty days.

3. To pay to other creditors who should execute the deed within sixty days, their respective debts, or a ratable proportion thereof, if proceeds should be insufficient to pay the whole.

4. If anything remain, to pay it over to Johnson & Pierce.

The deed contained a grant of full powers to Cross, and covenant, by Cross, to execute the trusts in the deed. The deed refers to schedule marked B, and made part of the deed, as "a schedule of the several creditors of the said Johnson & Pierce, with the amounts respectively due them, as nearly as can now be recollected and ascertained by said Johnson & Pierce."

The deed is signed and sealed by Johnson & Pierce, by Cross, and by many of the creditors of said Johnson & Pierce.

Among the creditors named in the schedule is said Cross, and his debt is put down at \$58 81.

The following memorandum is attached to the deed :

"In the foregoing schedule of debts are not included three notes due to McCracken & Struthers, amounting to about three thousand dollars ; also a note of about five hundred dollars to William H. Perry ; also a note of about five hundred dollars to Josephus Loring ; all of said notes being secured by mortgages on the real estate and mills and fixtures of the assignors."

The errors assigned were that the Circuit Court erred in excluding the evidence aforesaid.

SMITH, J.—This was an action of *trespass de bonis asportatis*. Declaration in the usual form, and plea of justification. Two grounds are assigned for error. 1. The court erred in excluding so much of the evidence as related to the sale of the property mentioned in the declaration. 2. That it also erred in refusing to admit the deed of assignment offered in evidence by the plaintiffs. From the bill of exceptions it appears that only so much of the evidence as related to the sale of the property named in the declaration as was contained in the written assignment described by the witness, was excluded, and therefore the parol evidence of the sale of which there existed written evidence in the possession of the party, which could be produced, was properly rejected. On the second point, although it does not appear upon what ground the Circuit Court refused to admit the deed of assignment in evidence, yet it is manifestly proper to consider that it could not have been upon the technical ground of want of proof of the due execution of the instrument ; for if that had been the reason,

it would, we think, have been so expressed in the bill of exceptions. The ground doubtless was that of the assignment's being fraudulent *per se*.

From an examination of the deed of assignment we can see no ground upon which this opinion can be sustained. The deed conveyed the property upon trust, and declared that the assignee should take immediate possession of it, and sell it at public or private sale, and appropriate the proceeds—1. To pay the costs of the assignment and expenses of the trust, incurred in its execution. 2. To pay certain creditors named the full amount of their respective claims if they should execute the deed in sixty days. 3. To pay to other creditors, who should execute the deed within sixty days, their respective debts, or ratable proportions thereof, if proceeds should be insufficient to pay the whole. 4. If anything remain, to pay it over to the assignors. It also contains a grant of full power to Cross, and covenants by Cross, the trustee, to execute the trusts contained in the deed. A schedule of the several creditors of the assignors, with the debts respectively due them, is referred to, and made a part of the deed. The deed is duly executed by the assignors, by Cross, the trustee, and by many of the creditors, of whom Cross is one. A memorandum is attached to the deed, reciting that the claims of three creditors are not inserted, because the debts due by the assignors to them are secured by mortgages on real estate. This is not the case of an assignment which is to depend on unjust conditions. It is positive and absolute; and no unjust terms are coupled with it to coerce the acceptance of it by the creditors of the assignors. They are not required to accept the property, nor is the payment of its avails to be made to them on the condition of their executing an absolute release of their respective claims against the debtors. The acceptance on their part is to be purely voluntary, and they are left free to pursue whatever remedy they may elect to compel the payment of the residue of their claims, in case the avails of the assigned property should prove inadequate to the liquidation of the whole debts.

In the case of *Clark et al. v. White*, the Supreme Court of the United States say, "the debtor may prefer one creditor, pay him fully, and exhaust his whole property, leaving nothing for others equally meritorious. Yet their case is not remedial; and why may not debts be partially paid in unequal amounts? If those who get partial payments are willing to give releases, it is their own matter, and should a third person interfere, debtor and creditor would well say to him, you are a stranger, and must stand aside." Such seems to be the acknowledged rule of the present day in the courts in England, and

Cross v. Bryant.

Purkett v. Gregory.

most of the United States, and is too well settled to be now disturbed. The rule, where bankrupt laws prevail, may necessarily be different, but not so with us.

The provision in the deed requiring the payment over of any surplus, should there be such, to the assignors, was not an improper condition. It was but the declaration of a resulting trust, which the law would raise had it not been inserted. Nor can the exclusion of the mortgage creditors, named in the memorandum, alter the principle. Indeed they might justly be considered as already secured.

Judgment reversed.

O. Peters, for plaintiff.

Logan and Walker, for defendants.

(a) Cases of assignments in our courts: *Conkling v. Corson*, 11 Ill. R., 503; *Nesbitt v. Digby*, 13 *ibid.*, 387; *Howell v. Edgar*, 8 Scam. R., 417; *Hudson v. Maze*, *ibid.*, 533; *Ramsdell v. Sigerson*, 2 Gilm. R., 79; *Cooper v. McClum*, 16 Ill. R., 435; *Wilson v. Pearson*, 20 *ibid.*, 81; *Robinson v. Nye*, 21 *ibid.*, 592; *Howlett v. Mills* 22 *ibid.*, 347.

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PURKETT v. GREGORY.

2 Scam. R., 44, 45.

Error to Morgan.

1. Plea of partial failure of consideration to an action upon a promissory note.
2. The payee of the note in question, who was a shareholder in a voluntary land company, had an undivided interest in the lands of the company, and was, of course, entitled to a dividend of the profits. Beside this, he had a preëmption right to the choice lands of the company upon a dissolution; *provided*, he bid for the choice a greater sum than any other shareholder. He sold his interest in the association, and also his preëmption right to bid for the choice lands, to the makers of the note, with an agreement he would bid and pay the *choice* money to his associates; he neglected to do this, whereby the makers of the note were deprived of the interest they purchased. *Held*, this constituted a failure of consideration to the extent mentioned in the plea.

THE action was assumpsit upon a note by the payee *v.* the makers. The plea was in these words:

“And the said defendants come and defend, etc., and say that as to \$163, part of the debt in the petition mentioned, the plaintiff *actionem non*; because they say that on the 23d day of August, 1836, the plaintiff sold to these defendants certain parcels of land situated in Illinois, being all the right and interest of said plaintiff in the Illinois Land Association, and also sold the defendants the dividends which the plaintiff was entitled to from the said association from the sale of choice of lands in said association; and the plaintiff covenanted and agreed with defendants to convey said lands to defendants, and to pay to the association presently, to wit, at the date aforesaid, the amount bid by said plaintiff for choice of lands in said association, and that said defendants should receive the dividend which said plaintiff was entitled to, arising out of the payment of choice money as aforesaid.

Purkett v. Gregory.

In consideration of which sale and agreements on the part of the plaintiff, the defendants executed the note in the petition mentioned, and the defendants aver that the choice money to which the plaintiff was entitled from the association aforesaid, and which the said plaintiff covenanted that these defendants should receive, amounted to the sum of \$163. And they further aver that the said plaintiff hath not paid the amount bid by him for choice of lands in said association, in consequence of which failure of the plaintiff to pay said association the amount bid as aforesaid, the defendants have not received the dividends due said plaintiff, as said plaintiff covenanted that said defendants should receive. Wherefore the defendants say that the consideration for which said note in the petition mentioned was given, hath failed to the extent of \$163 as aforesaid, all which they are ready to verify, etc. Wherefore, etc."

The plaintiff demurred, and the Circuit Court sustained the demurrer.

SMITH, J.—This plea contained facts, which, if proven, would form, in our opinion, a clear failure of a part of the consideration on which the note must have been based. It certainly must have been one of the inducements to the making of the note, that the makers should be entitled to and receive these proportions of the dividends from the association on the sale of the lands. If the plaintiff below agreed to pay the amount bid for the choice of lands, and it was a condition that he should, by the rules of the association and of the sales of the lands, pay the amount bid before he could be entitled to a dividend from the proceeds of the sale, from the company; then, if by such refusal or neglect to pay, by the plaintiff, the defendants were prevented from receiving their proportion thereof, the terms upon which the contract was made, were not complied with to the extent of the dividends he would otherwise have been entitled to receive, which would be a matter of proof on the trial. We are of opinion the plea was substantially good; and that the Circuit Court ought to have overruled the demurrer to it.

Judgment reversed.

W. Thomas, for plaintiffs.

M. Leslie, for defendant.

Leggett v. Chrisman.

LEGGETT v. CHRISMAN.

2 Scam. R., 46.

Appeal from Morgan.

1. Where a judgment is rendered in a court of record against several defendants, all must join in a writ of error to reverse it, or one must sue out the writ of error, and also summon and sever his co-defendants.
2. But one of several defendants may appeal from the judgment of a justice of the peace.
3. A justice's court is not one of record.

BROWNE, J.—This was a suit originally brought before a justice of the peace of Morgan county, by Charles Chrisman against John Leggett, who was impleaded with Francis A. Landram and James Tucker. Leggett, the appellant, pleaded *non est factum*. Judgment was rendered by the justice of the peace against all the defendants. Leggett appealed from the judgment of the justice of the peace, to the Circuit Court of Morgan county. The two other defendants refused to join in the appeal. In the Circuit Court the appellee moved to dismiss the appeal, because the other defendants had not joined in the appeal, which motion was sustained by the court, and the suit dismissed accordingly. On a judgment against several parties, the writ of error must be brought in all their names, provided they are all living and aggrieved by the judgment; for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from his execution for a long time, and from having any benefit of his judgment, though it be affirmed once or oftener; and if the writ of error in such a case be brought by one or more of the defendants, it may be quashed, or the court will give the plaintiff leave to take out an execution.

If a writ of error be brought in the names of the several parties, and any one or more refuse to appeal and assign error, they must be summoned and severed, after which the writ of error may be proceeded in by the rest alone. These reasons do not apply to a court of a justice of the peace. No writ of error lies to that court; the party is bound to appeal his suit in twenty days, or he is precluded. This practice is not productive of a delay. The judgment of the Circuit Court of Morgan county is reversed with costs; and the cause remanded to be tried upon its merits.

*Judgment reversed.**W. Brown, for appellant.**J. Lamborn, for appellee.*

Bryan v. Smith.

BRYAN v. SMITH.

2 Scam. R., 47.

Error to Madison.

1. Action of *account*. (a)
2. Oral evidence is inadmissible to prove a tenancy in common in lapsed estates, when it is apparent that written evidence of the tenancy exists, and is within the power of the party upon whom the *onus* rests.
3. A judgment need not specify the costs *in numero*. (b)
4. Costs are taxed by the clerk.
5. Where *original*, *alias*, and *pluries* writs of *feri facias*, issue upon a judgment, they will necessarily vary as to the amount of taxable costs.
6. Where matters of practice necessarily involve the title to real estate in collateral actions, the courts will lean in favor of the regularity of judicial proceedings.

It is unnecessary to state the facts of this cause, and only so much of the opinion as relates to a *novel* question under our system of jurisdiction will be given.

SMITH, J.—On the second point of the rejection of the *alias fieri facias* under which the plaintiffs derived their title by purchase, at the sheriff's sale, it is admitted that if the strict, regular rules of the English and many American authorities, in some of the State courts are to prevail with us, there would, in the rejection of the executions offered in evidence, be no departure from those rules, as adopted by them; and that *alias* executions not corresponding in the amount of the costs, with the first or original writ of *feri facias*, should be rejected on the ground of variance. In courts where a regular judgment roll is made up, containing the amount of the whole judgment with the costs, there is much reason that this correspondence should be observed; and the more so as no execution can embrace any subsequent costs, made beyond the amount for which judgment is given *in numero*. But our practice has uniformly, in all our courts, been different.

In the first place, the clerk enters the judgment on his records, when rendered; and costs are awarded without any specification of the amount. He subsequently makes up his costs without any taxation by the court, and inserts them in the writ of *feri facias*. Whenever a second or *alias* writ issues, the costs attendant on the first writ are included with the additional costs in the second, and those of the *alias*, in like manner, in a *pluries*, if it issue; hence the *alias* and *pluries* cannot correspond with the original writ of *feri facias*; and therefore it would be unjust to require the exact correspondence in those writs, which is exacted in courts which do not allow the subsequent costs, and where the adherence to the judgment roll, in respect to costs, is considered as essential to the regularity of the

Bryan v. Smith.

Merriweather v. Gregory.

proceedings, on the execution of the judgment. We presume that it was the discrepancy between the executions in the amount of costs, which induced the Circuit Court to reject the *alias* writ of *feri facias*, and which, on more mature reflection, we presume it would not have considered as a serious objection to its reception in evidence. If the rigid rules to which we have alluded were adopted in our courts, it would be most manifest that the titles to real estate purchased under execution at sheriff's sales, might be most seriously affected in numerous cases, if not entirely destroyed. Hence it becomes a question of grave import, whether the present practice, although it may not be entirely free from objection from its looseness, had not better continue to be sanctioned, than to innovate on it, by which such serious consequences might ensue. We think so; and therefore reverse the judgment of the Circuit Court with costs, and remand the cause with directions to the Circuit Court, to award a *venire de novo*.

*Judgment reversed.**Semple and Breese*, for plaintiffs.*J. B. Thomas, Prickett and Logan*, for defendants.

(a) *Vide* Cooke's Stat., 211-212. Construction thereof: *Bedeß v. Janney*, 4 Gilm. R., 206; *Lee v. Abrams*, 12 Ill. R., 111.

The action may be commenced by *attachment*: *Humphreys v. Matthews*, 11 Ill. R., 471.

(b) *S. P. Simms v. Klein*, Bre. R., 292; *Jackson v. Cummings*, 15 Ill. R., 452.

MERRIWEATHER v. GREGORY.

2 Scam. R., 50.

Appeal from Greene.

1. ACTION of debt—pleas *nil debit* and two special pleas—demurrer to the latter pleas sustained and judgment for plaintiff.—Judgment reversed.

2. It is error to render judgment where a plea is undisposed of. (a)

3. Duplicity is a ground of general demurrer to a plea. (b)

4. A plea which is uncertain is bad upon general demurrer. (c)

5. Where a judgment is rendered, without noticing a plea on file, the judgment will be reversed, and cause remanded for trial upon the undisposed of plea. (d)

*Judgment reversed.**J. J. Hardin*, for appellant.*S. T. Logan*, for appellee.

(a) S. P. That all issues of law and fact must be disposed of to justify the regularity of the judgment: *White v. Thompson*, Bre. R., 48; *Semple v. Lock*, Bre. App., 5; *Marshall v. Duke*, 3 Scam. R., 67; *Russell v. Hamilton*, 2 *ibid.*, 57; *Bradshaw v. Hoblett*, 4 *ibid.*, 53; *McKinney v. May*, 1 *ibid.*, 534; *Nye v. Wright*, 2 *ibid.*,

Merriweather v. Gregory.

Evans v. Landon.

222; Manlove v. Bruner, 1 *ibid.*, 390; Lyon v. Barney, *ibid.*, 387; Bradshaw v. McKenney, 4 *ibid.*, 54; Pearl v. Wellman, 3 *Gilm. R.*, 326; Jones v. Francis, *Bre. R.*, 125; Steelman v. Watson, 5 *Gilm. R.*, 249; Moore v. Little, 11 *Ill. R.*, 549.

Cases where the irregularity is waived: Wetter v. McNeil, 3 *Scam. R.*, 434; Phillips v. Dana, 1 *ibid.*, 498.

(b) Cases of duplicity, etc.: Godfrey v. Buckmaster, 1 *Scam. R.*, 447; Merreweather v. Smith, 2 *ibid.*, 81; Mann v. McGoon, 2 *ibid.*, 77; Witter v. McNeil, 3 *ibid.*, 436; Calhoun v. Wright, 3 *ibid.*, 74; Burrass v. Hewett, 3 *ibid.*, 225; Hereford v. Crow, 3 *ibid.*, 423; Kinney v. Turner, 15 *Ill. R.*, 183; Halligan v. Chicago, *ibid.*, 559.

(c) As to questions of certainty: Merreweather v. Smith, 2 *Scam. R.*, 81; Wann v. McGoon, *ibid.*, 77; Phoebe v. Jay, *Bre. R.*, 214; Wagg v. Lane, 3 *Scam.*, 237; Murphy v. Summerville, *ibid.*, 362.

(d) This order has been invariably entered upon reversals. *Vide* the cases cited in note (a).

EVANS v. LANDON.

2 *Scam. R.*, 53.

Appeal from Greene.

1. Petition and summons.
2. This is a popular action, intended to enable every creditor whose debt is certain, and evidenced by a written instrument, to bring his own suit; it is a speedy mode of proceeding, and all intendments will be indulged in to sustain the regularity of the proceeding. (a)
3. This form of action may be sustained upon a note payable "in good bank paper."
4. On such a note, an averment in the petition that "the debt remains due and unpaid" is sufficient; no special averment is required.

THE facts appear in the opinion of the court. The arguments of counsel are given because the case is novel.

Cyrus Walker, for the appellant, contended that this form of remedy would not lie in this case. That the statute under which this proceeding was had was borrowed from Kentucky; and that it was a principle of judicial exegesis, that when one State or country adopted a statute from another, in the enactment of the statute, the construction which was given to it in the country from whence it was taken, was adopted. In Kentucky it has been decided that this remedy will not lie where it is necessary to make any averment. 6 *Monroe*, 335. The note sued on is not for the direct payment of money, nor for the direct payment of property, but for one or the other; and consequently to sustain the action, there should be an averment of the non-payment of the property or bank paper. The act is in derogation of the common law, and should be strictly construed.

S. T. Logan, for the appellee, said the act was not in derogation of the common law, but of a highly remedial nature, and should receive a most liberal construction. That it was an act for the people, the whole people; enabling them to dispense entirely with lawyers, and each man of them to bring his own suit. The averment that the debt is not paid is all that can be necessary.

BROWNE, Justice, delivered the opinion of the court:

Evans v. Landon.

This is an appeal brought from the Circuit Court of Greene county. A petition was filed under a statute of our State "simplifying" proceedings at law for the collection of debts, upon the following note :

"Sixty days after date I do promise to pay Horace Landon the sum of six hundred and fifty dollars, dated this 29th day of January, 1838. The above sum may be paid in good bank paper.

"JOHN EVANS."

The defendant filed a general demurrer to the petition, which was overruled by the court, and judgment given for the plaintiff, from which decision the defendant appealed to this court. The assignment of errors presents the question whether the remedy by petition can be applied to such a note. They have a statute in Kentucky very similar to ours, which has always been liberally construed by their courts. It seems to me one of the objects of the statute was to enable any person to bring his own suit. I am strengthened in this opinion from the circumstance of the form of the petition being laid down in the statute. The statute is intended to give a more speedy remedy than was afforded by proceedings at law. This form of remedy was given in an action on a bond or note only, because the bond or note furnished *prima facie* evidence of the debt, and there was not likely, as in other cases, to exist extraneous matters of defence. When the suit is brought by petition and summons, the statute requires the defendant to appear and answer the demand on the second day of the term. If the suit had been brought in the usual mode, it perhaps would have been necessary for the plaintiff to aver the non-payment of the bank bills as well as the money. But the averment in this case is made in the terms of the statute; that the same "debt remains unpaid," which is, in our opinion, sufficient. This averment does not preclude the defendant from pleading a tender of payment of the bank bills or money.

Judgment affirmed.

(a) The statute will be found in Cooke's Stat., 240, secs. 83-87. *Decisions* construing it: *Duncan v. McAfee*, 2 Scam. R., 559; *Hey v. Stapp*, 1 Scam. R., 96; *Jackson v. Haskell*, 2 *ibid.*, 565; *McConnel v. Thomas*, 2 *ibid.* 814; 3 Scam. R., 96; 2 Scam. R., 576.

Jones v. Sprague.

JONES v. SPRAGUE.

2 Scam. R., 55.

Error to White.

1. Origin of bills of exceptions.
2. A bill of exceptions must be signed by the judge who tried the cause.
3. A bill of exceptions must be sealed by the judge who tried the cause.
4. Where a bill of exceptions is unsigned and unsealed, the Supreme Court will indulge in no presumptions in behalf of the party tendering and relying upon it.
5. A *certiorari* alleging diminution of the record, will be awarded after the commencement of the argument in the Supreme Court.

LOCKWOOD, J.—The assignment of error in this case questions the correctness of the Circuit Court in overruling objections to the testimony offered by the defendant below. On the argument it was objected that the bill of exceptions had not been signed and sealed by the judge who tried the cause.

After the rendition of the judgment of the court, who had tried the cause without a jury, by consent of the parties, the record states “to which opinion of the court the plaintiff, by his counsel excepts, and thereupon filed his bill of exceptions to the opinion of the court, which said bill of exceptions is in the following words and figures, viz.” The record then contains what purports to be a bill of exceptions, but is without the signature and seal of the judge, or even a statement that the judge had signed and sealed it.

Bills of exceptions were first introduced by the statute of Westminster 2, 13 Edward 1, chap. 3; and by that act and the practice arising under it, the judge who signed the bill was required by writ to come into the appellate court to confess or deny the seal affixed to the bill of exceptions. The legislature of this State, doubtless to remedy the onerous duty of the judge in coming to court to acknowledge or deny his seal, and the delay to the party in suing out the writ, have declared if during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow the said exception, and to sign and seal the same; and the said exception shall thereupon become a part of the record of such cause.

Now from anything that appears in this record, the judge, when he was presented the bill of exceptions, may have refused to sign it. It being on the files of the court, as the exceptions prepared by the defendant, furnishes no evidence of its allowance by the judge. The name of the judge, with a *locus sigilli*, ought to have appeared at the end of the bill of exceptions, to justify this court in treating it as a

Jones v. Sprague.

Russell v. Hamilton.

legal part of the record. The objection, therefore, that the judge had not signed and sealed the bill of exceptions is fatal.

Judgment affirmed.

Ficklin and Eddy, for plaintiff.

D. J. Baker, for defendant.

RUSSELL v. HAMILTON.

2 SCAM. R., 56.

Error to Municipal Court of Chicago.

1. In debt upon a *sealed* note, *non est factum* is a proper plea, though not verified by affidavit; every common law defence may be relied upon under this issue, such as a variance, etc., *except the execution of the note.* (a)
2. Where a party is entitled to cumulative remedies, a judgment in one action is no bar to another suit, unless the first judgment has been paid or otherwise satisfied or released.
3. Where a school commissioner sues upon a note for the benefit of a township, the inhabitants of the township are not competent jurors.
4. Where a statute gives 20 per cent. interest in case a debt due the school fund is not paid at maturity, it is to be regarded as a penalty, and cannot be recovered unless the facts are averred and a claim made for it in the declaration.

DEBT on a sealed note, payable to Hamilton School Commissioner of Cook county on account of a transaction relating to school township 39 N. 14 E. This note was secured by mortgage upon real estate. The mortgage had been prior to this action foreclosed by *scire facias* under the statute. The defendants pleaded, 1, *non est factum*; this plea was not verified by affidavit. 4, the foreclosure of the mortgage; but the plea omitted to aver that the judgment upon the foreclosure had been satisfied by payment or otherwise. Demurrers were sustained to these pleas. Upon second and third pleas, issues of fact were joined, and a verdict and judgment rendered for the plaintiff. On the trial inhabitants of 39 N. 14 E. were called and challenged, because of their interest. The challenges were overruled. The declaration in this cause did not aver a forfeiture and claim by reason thereof of twenty per cent. penalty under the statute.

LOCKWOOD, J.—The court below decided erroneously in sustaining the demurrer to the defendant's first plea.

The plea of *non est factum* may be pleaded, notwithstanding it is not verified by affidavit.

The fourth plea was clearly bad for not averring that the judgment against Russell had been paid. A great number of other errors have been assigned; it is however necessary to notice but the two following, to wit. The court overruled objections to persons sitting on the jury

 Russell v. Hamilton.

who were inhabitants of township thirty-nine North, range 14 East. And the court instructed the jury that they might allow twenty per cent. damages, although no such damages were claimed in the declaration. The court erred on both points. In the case of *Wood v. Stoddard, qui tam*, the plaintiff below brought an action to recover of the defendant below a sum received by him for excessive interest, under the act for preventing usury, one moiety of which was directed to go to the use of the poor in the town where the offence was committed, and the other to the person prosecuting. The jury were inhabitants of the town where the offence was committed. The defendant below challenged all the jurors as being interested; but the objection was overruled and the jurors sworn. The court say, "the relaxation of the rule as to questions of interest, has never been extended to jurors. They must be *omne exceptione majores*, free from every objection, and wholly disinterested." The twenty per cent. given by the statute is penalty on the party for not paying the debt and interest; and must be declared for if the plaintiff seeks to recover it. The record in this case exhibits the informality of proceeding to trial on the replications to the defendants' second and third pleas, without issue being joined by the defendants. These irregularities must be corrected in the court below.

The judgment, for the reasons above given, is reversed with costs; and the cause remanded to the Circuit Court of Cook county, with directions to cause the pleadings to be perfected as herein directed, and then that a *venire de novo* be awarded.

Judgment reversed.

Butterfield and Peyton, for plaintiffs.

Giles Spring, for defendant.

(a) *S. P. Longley v. Norvel*, 1 Scam. R., 839; *Pankney v. Mitchell*, Bre. R., 801.

The plea of *non est factum* does not put in issue the execution of the instrument sued upon, unless verified by affidavit: *Whiteside v. Lee*, 1 Scam. R., 355; *Walter v. Trustees of Schools*, 12 Ill. R., 65.

The plea of *non est factum* sworn to, is a personal defence, and co-defendants cannot receive any benefit from it: *Stevenson v. Farnsworth*, 2 Gilm. R., 716.

No other defences can be relied upon under the plea of *non est factum* than such as relate to the execution and identity of the instrument sued on: *Pritchett v. People*, 1 Gilm. R., 530.

The power of a corporation to execute a deed cannot be questioned under the plea of *non est factum*: *Holcomb v. Canal*, 2 Scam. R., 228.

When a deed is set forth in a declaration, simply by way of *inducement*, the plea of *non est factum* is improper: *Graham v. Dixon*, 8 Scam. R., 116.

 Beams v. Denham.

BEAMS v. DENHAM.

2 Scam. R., 58-60.

Appeal from Madison.

1. If the answer to a bill for an injunction denies the equity of the complainant, the injunction must be dissolved unless further proof is taken. (a)
2. But the court has no right, upon the dissolution of the injunction, to dismiss the bill.
3. Where an answer to a bill in equity is filed in term time, the complainant has four days to *reply*. (b)
4. The complainant was sued at law upon a replevin bond—the action was returnable to the August term of the court—he had a good defence to the action, but after service was taken sick and disabled from attending the court at the term, and sent an agent to superintend his defence; the agent stated the facts to the plaintiff's counsel, who, under the circumstances, agreed to continue the cause; notwithstanding which agreement, he took judgment by default, at the return term. *Held*, that equity would relieve the complainant.
5. Where the Circuit Court dismiss a bill in equity after answer filed, but before the expiration of four days, within which the complainant has a right to file his replication, the Supreme Court will reverse the decree and remand the cause with instructions to permit the complainant to file his replication and take depositions in support of his bill.

LOCKWOOD, J.—Beams and Archer filed their bill in chancery in the Madison Circuit Court, setting forth, among other things, that Buckmaster, for the use of Denham, had commenced an action against Beams and Archer on a replevin bond; that shortly before the term of the court to which the writ in the action on the replevin bond, to wit, August term, 1838, was returnable, Beams, one of the complainants, and who was the principal in the bond, became sick and unable to attend the court. That he sent an agent to court to attend to his suit; that said agent called upon the attorney for the plaintiff in the suit on the replevin bond, who informed said agent, in view of the circumstances of the case, that said suit should be continued; that notwithstanding said agreement to continue the cause, the plaintiff proceeded to take a judgment by default at the August term, 1838, and executed a writ of inquiry in which the damages were assessed at \$600, being the whole amount of the penalty of the bond, and which sum they allege they are not justly or equitably bound to pay. The bill further states, that complainants do not mean to charge the attorney for the plaintiff in said suit with fraud in taking the judgment by default, but suppose that the judgment by default was taken by mistake or forgetfulness, in consequence of pressing and multifarious business.

The bill prays for an injunction, and that in consideration of the premises, that the court will award complainants a new trial.

An injunction was allowed, and at the time the summons was made returnable, the defendants demurred to a part of the bill, and pleaded to other parts. Denham also filed an answer, denying the equity of the bill.

The defendants, by their counsel, thereupon moved the court below

to dissolve the injunction, which motion being argued, the court dissolved the injunction, dismissed the bill, and ordered the complainants to pay damages and costs.

The assignment of errors questions the power of the court, on a motion to dissolve an injunction, to dismiss the bill and give costs.

By the 14th section of the "*Act prescribing the mode of proceeding in Chancery*," it is enacted that "Replications shall be filed within four days after answer, if such answer be put in in term time; or if in vacation, then the plaintiff or his attorney shall have notice of the filing of his answer and which shall be general, and all parties shall have the same advantage as if they were special; and after replication filed, the cause shall be deemed at issue, and stand for trial at the next term; or in default of filing such replication, the cause may be set for hearing upon bill and answer; in which case the answer shall be taken as true, and no evidence shall be received, unless it be matter of record to which the answer refers. When the complainants shall require a discovery respecting the matters charged in the bill, the disclosure shall not be deemed conclusive, but if a replication be filed, may be disproved or contradicted like any other testimony, according to the practice of courts of equity."

By the 13th section of the "*Act regulating the issuing of writs of Ne Exeat and Injunctions*," it is provided that "Upon the filing of an answer, it shall be in order at any time in term, to move for a dissolution of the injunction; and upon such motion it shall be lawful for the parties to introduce testimony to support the bill and answer; the court shall decide such motion upon the weight of testimony, without being bound to take such answer as absolutely true." There is no doubt, under these provisions of the several statutes, regulating proceedings in chancery, and issuing writs of injunction, that the Circuit Court had power in this case to dissolve the injunction, if in its opinion the answer denied the equity of the bill. Still it does not follow that the bill should also be dismissed, because the injunction is dissolved.

Before a bill can be dismissed, there must be an issue made up between the parties in the manner prescribed by the 14th section of the act regulating proceedings in chancery. It does not appear in the record whether four days in term had intervened between the filing of the answer and the dismissal of the bill. To justify the court in hearing the case on bill and answer, it should have appeared that the complainants were in default in not replying within four days after filing the answer. This nowhere appears. The allegations in the bill that the complainants neglected to make a defence in conse-

Beams v. Denham.

Lincoln v. Cook.

quence of the promise of the attorney in the suit to continue the cause on the replevin bond, would, if true, be sufficient ground for a court of equity to grant relief. The complainants, upon the assurance that the cause should be continued, were justifiable in not being prepared for trial. The default was consequently against good faith, and deprived them of their legal right to have a trial on the merits. The complainants, by their premature dismissal of their bill, have been deprived of the opportunity of taking depositions to prove their allegations. The dismissal of the bill was consequently irregular. The judgment of the court below, in dismissing the bill and giving costs, is reversed with costs, and the cause remanded with instructions to the court below to permit complainants to file a replication, and then proceed in the cause, to enable the parties to take depositions, according to the provisions of the statute.

Decree reversed, etc.

Logan, Gillespie, and Smith, for appellants.

Cowles and Krum, for appellees.

(a) *Vide Cooke's Stat.*, 148, sec. 18: *S. P. Parkenson v. Trousdale*, 8 Scam. R., 370.

Where the bill does not contain equity upon its face, the injunction will be dissolved on motion, before answer filed: *Reynolds v. Mitchell*, Breese R., 185.

Where an injunction bill is filed against several, some of whom are served, and others not, and one of the defendants answers fully the equity of the bill, the injunction will be dissolved without waiting for the appearance and answers of the co-defendants: *Beard v. Forman*, Breese R., 804.

Where the oath of the defendant is waived, the injunction will not be dissolved upon the coming in of the unsworn answer: *Gray v. McNance*, 11 Ill. R., 826.

(b) *Vide Cooke's Stat.*, 142, sec. 81.

LINCOLN v. COOK.

2 Scam. R., 61.

Error to Municipal Court of Chicago.

1. Where parties, after judgment upon demurrer, agree to try issues of fact upon other pleadings, without any reservation of their rights upon the questions of law arising upon the demurrer, this constitutes *per se* a waiver of the demurrer.
2. An arbitrator may examine a witness in the absence of both the parties litigant.
3. Where an award directed the parties to execute mutual releases, and also that one of the parties should pay to the other a certain sum of money, and the one who was entitled to the money tendered to his adversary a release, upon condition that the latter would pay him the sum of money awarded by the arbitrator on the day specified in the award, and the party to whom the tender was made refused to accept the release, but made no objection to the terms imposed; on the contrary, placed his refusal upon the simple ground that the award was void. *Held*, that the tender was sufficient.
4. Meaning of the term "*ex parte*."

SMITH, J.—This was an action of *debt* on an award. One of the errors assigned questions the correctness of the decision of the Municipal Court of the city of Chicago, on a demurrer to the first plea of the defendant.

The court sustained the demurrer to the plea. Afterward, the record recites, that after replication filed on the 5th and 6th pleas, "issues are joined by agreement of the parties, and the cause is submitted to a jury."

The parties, by this agreement, must be considered as waiving all objections to the form of the pleadings on either side; and hence the accuracy of the decision on the demurrer to the plea is not properly before this court for its decision. The remaining errors assigned arise out of the evidence disclosed by the bill of exceptions. We do not perceive the force of the objections to the decision of the court, upon the other grounds disclosed by the bill; or that it becomes material to comment on the alleged errors, except those relating to the admission of the release in evidence, and the instructions on what it is contended was the *ex parte* examination of a witness. It appears that the release tendered by Cook to Lincoln was a conditional one, and not absolute within the meaning of the terms expressed in the award, and, strictly considered, was not a compliance with the act awarded to be done. The release was to take effect upon Lincoln's securing the payment of the money, by good personal security, on the day of payment specified by the arbitrator. Yet as Lincoln was also required to execute his release, and deliver it to Cook within the time specified, we must consider it was the intention of the arbitrator, to be deduced from the award, that the releases were not only to be mutual, but were to be delivered at the same time. The delivery of the releases to each other, it is apparent, must be construed to be *pari passu*. Lincoln, however, made no objection to the terms of the release offered by Cook, but refused to receive it, stating that the "award was not binding, and was good for nothing."

We are of opinion, that the offer to deliver the release, as no objection was made to its character or sufficiency, was evidence of an offer to perform the award on the part of Cook, and that the release was properly admitted in evidence.

If Lincoln had refused to receive the release because it was conditional, and Cook had refused to make one conformable to the condition of the award, then it would have been a failure to comply with the award, and would have been a non-compliance with it.

The case may be likened to the tender of bank-notes. If the party to whom the payment is offered, does not object to the payment because it is offered in notes, the tender would be held good, although if he had objected, the legal coin of the country would alone have been a tender. So here, the objection is to a reception of the release offered on any terms, and not to its sufficiency. The Circuit Court

Lincoln v. Cook.

Ballance v. Frisby.

decided that the examination of a witness by the person who was the sole arbitrator, in the absence of both the parties, was not an *ex parte* examination, and correctly so.

The term *ex parte* implies an examination in the presence of one of the parties, and in the absence of the other.

Judgment affirmed.

Caton and Judd, for appellants.

Morris, Thomas, and Leslie, for appellee.



BALLANCE v. FRISBY.

2 Scam. R., 63-65.

Appeal from Peoria.

1. *Res inter alias acta—contribution.*
2. Where two or more persons are jointly indebted to a third person, either has a right to pay the debt and call upon his co-debtor for contribution.
3. The receipt of the creditor is evidence of the payment in an action for contribution.
4. The general issue admits the character in which the plaintiff sues; *eo. gr.*, where the plaintiff sues as administrator of an intestate.
5. The pleadings before a justice of the peace are *ore tenus*.

LOCKWOOD, J.—This was an action of *assumpsit* brought originally before a justice of the peace, by L. Bigelow against Ballance, for money paid to his use. On the death of Bigelow the suit was renewed in the name of Frisby and Metcalf, as administrators. On the trial of the cause in the Circuit Court, it appears, from the evidence, that Bigelow and one Underhill, having a controversy with Ballance, submitted their differences to three arbitrators chosen by the parties. That the arbitration took place, and each of the parties attended; that the arbitrators made an award in pursuance of their authority. The plaintiffs below then proved the signature of Dan Stone, one of said arbitrators, to a receipt, which is as follows, to wit: "Feb. 11, 1838. Lewis Bigelow, Isaac Underhill, and Charles Ballance, to Dan Stone, Dr.—For expenses, travel, and services, in attending arbitration at Peoria, \$150. Received of Lewis Bigelow the above sum of one hundred and fifty dollars. Feb. 12, 1838. Dan Stone."

To the reading of this receipt in evidence the defendant objected, which objection was overruled, and the receipt was read as evidence.

The assignment of errors questions the correctness of the decision of the court below in permitting the receipt to be given in evidence. By an examination of the bill of exceptions taken in this cause, it appears that the only object of the plaintiff below, in offering the

Ballance v. Frisby.

Harlan v. Scott.

receipt, was to prove the payment of the money to D. Stone; other evidence having been adduced to prove that the plaintiff below and the defendant were jointly indebted to Dan Stone. Both the plaintiff and defendant being jointly indebted to D. Stone, either had a right to pay the money, and call on his co-debtor to repay his moiety of the debt. To prove the payment, either the verbal or written confession of the person to whom the payment ought to be made, was *prima facie* evidence that the payment had been made. The receipt was not evidence that the parties were indebted to Stone, and was not offered for that purpose. The court below consequently decided correctly in permitting the receipt, after its execution had been proved, to be read in evidence. It is also relied for error, that no evidence was given in the court below, that Frisby and Metcalf were administrators of Bigelow. No objection was made, on the trial, that they were not administrators. In actions originally commenced in the Circuit Court, unless the defendant interposes a plea that the plaintiff is not administrator, the plaintiff's right to sue in that character is admitted. In actions originally commenced before a justice of the peace, the parties do not file written pleadings. The proceedings are all *ore tenus*; and consequently the plaintiffs were under no necessity of proving that they were administrators, unless the defendant, on the trial, objected that they were not administrators.

*Judgment affirmed.**Peters and Ballance, for appellant.**Frisby and Metcalf, for appellees.*

HARLAN v. SCOTT.

2 Scam. R., 65-67.

Appeal from St. Clair.

1. ON appeal from a J. P. to the Circuit Court, in an action for a forcible entry and detainer—the power to permit the appeal bond to be amended is discretionary in the Circuit Court, and its decision upon the application to amend cannot be reviewed upon writ of error by the Supreme Court.

2. Upon the dismissal of an appeal in forcible entry and detainer, the Circuit Court may award a writ of restitution.

*Judgment affirmed.**Shields, for appellant.**Lyman Trumbull, for appellee.*

STOUT v. McADAMS.

2 Scam. R., 67-69.

Error to Fayette.

1. *Case for injury to a riparian right.*
2. If a dam is constructed by a proprietor of a mill site to such a height as to throw water back upon the wheel of a proprietor of a mill situate higher upon the stream, so as to obstruct him in the enjoyment of his riparian right: *Case* lies for the injury.
3. The first occupant of a mill privilege upon a stream of water does not acquire an exclusive right against his neighbor who owns a similar site, either above or below him. (a)
4. Instructions which are calculated to mislead a jury ought not to be given by the court. (b)

WILSON, C. J.—The plaintiff below alleges that he is the owner of a mill on Shoal Creek, and that the defendant has erected a dam on the same creek, below his mill, and thereby flooded and overflowed his mill, so as greatly to damage it. The defendant pleaded the general issue. Several exceptions are taken to the opinion of the court on the trial below. The first exception relates to the decision of the court in admitting the title deeds of the defendant to be read in evidence, and rejecting those of the plaintiff. It does not clearly appear from the bill of exceptions upon what grounds the court refused to permit the plaintiff to give in evidence his title to the land on which his mill was erected; but as possession is sufficient to entitle the plaintiff to maintain his action, and as the correctness or incorrectness of the rejection of his title papers cannot be determined from the facts disclosed, we give no opinion on this point.

The instructions which the court gave to the jury, and its refusal to give such as were asked for by the counsel for the plaintiff, are also assigned for error. The instructions asked for by the plaintiff were, "That if the jury believed from the testimony, that the water from the defendant's mill-dam flooded the wheel of the plaintiff, they are bound to find for the plaintiff the amount of damages proved to have been sustained by him; and that it is immaterial in this case which party commenced work or finished his mill first, unless they further believe that the defendant had a right, by prescription or otherwise, to flood the water as aforesaid." This instruction the court refused to give, but instructed the jury "That he who first occupies the site and constructs a mill and dam, will be entitled to the use of as much water as will turn his wheels, if the privilege will afford it, notwithstanding he may, by such occupation, render useless the privilege of another, either above or below him, upon the same stream;" and further, "That upon legal principles every person has an equal right to the use of the water flowing through his land, and to use it in a reason-

able manner only; and if they shall believe from the evidence, that the defendant used the water in an unreasonable manner, and the plaintiff is injured by it, then the plaintiff is entitled to such damages as he may have proved; but that the law does not afford a remedy for every trifling inconvenience which another may be put to, by the reasonable exercise of one's own right." The court also instructed the jury, "That if they believe from the evidence that the plaintiff could raise his wheels, so as to avoid the injury occasioned by the back water, and still employ his head water to every advantage, that they will find for the defendant; or if the defendant could use his privilege to every advantage by lowering his dam or wheel, so as to lessen or prevent the back water, then for the plaintiff."

The court erred in refusing the instructions asked for, and also in those which it gave.

There is nothing in the instructions asked for by the plaintiff, that the defendant can object to; they were pertinent to the case, and such as the plaintiff had a legal right to require of the court. There can be no doubt that every flowing back, or throwing water upon the land of another, is such an act as entitles the individual injured to his action; and although the act of the one person may be in itself lawful, yet if in its consequences it necessarily damages the property of another, the party occasioning the damage is liable to make reparation commensurate to the injury he has caused; as when one man builds his house so close to another's land, as to throw the water from the roof of his house upon the land of his neighbor. In this case, the erection of the house was lawful in itself, but became unlawful by reason of the injury resulting to another. Upon the same principle, although the erection of the dam of the defendant was not unlawful *per se*, yet, as in its consequences it abridged the rights and damaged the property of the plaintiff, the defendant is responsible to him for the consequences.

Most of the instructions which the court gave are inapplicable to the case, but so far as they do apply, they are wrong. The judge said that "He who first occupies the site, and completes a mill and dam," etc. This is incorrect. By building a mill-dam one does not acquire any right whatever to overflow the land of his neighbor, whether his neighbor has a mill or not. Every one must so use his own property as not to injure another.

The remainder of the instructions we consider as entirely irrelevant and inapplicable to the case on trial, and consequently ought not to have been given, as they were calculated to mislead the jury. The judgment of the Circuit Court is therefore reversed with costs,

Stout v. McAdams.

White v. Martin.

Adams v. Colton.

and the case remanded to be retried in conformity with this opinion.

Judgment reversed.

Forman and Semple, for plaintiff.

Cowles, White and Eddy, for defendant.

(a) Cases relating to riparian rights decided by the Illinois courts: *Evans v. Merriweather*, 3 Scam. R., 492; *Plumleigh v. Dawson*, 1 Gilm. R., 550; *Canal Trustees v. Haven*, 11 Ill. R., 557; *Middleton v. Pritchard*, 3 Scam. R., 519; *Hill v. Ward*, 2 Gilm. R., 285; *People v. St. Louis*, 5 Gilm. R., 351; *Wilcoxon v. McGhee*, 12 Ill. R., 381.

(b) *S. P. Baxter v. People*, 8 Gilm. R., 368.

WHITE v. MARTIN.

2 Scam. R., 69.

Appeal from Hancock.

WHERE, after the hearing of the evidence, arguments of counsel and the instructions, the court adjourned directing the jury in case they agreed, to seal their verdict and deliver it to the clerk of the court, and the jury being unable to agree delivered to the clerk a sealed paper stating the fact of non-agreement and dispersed, and upon the opening of the court thereafter the court directed the jury to again retire and consider of their verdict, the plaintiff consenting and the defendant objecting—held that the verdict finally agreed upon was a nullity.

Judgment reversed.

C. Walker, for appellant.

A. Williams, for appellee.

ADAMS v. COLTON.

2 Scam. R., 71.

Error to Will.

An affidavit which conforms to the statute, entitles a party to a continuance. (a)

THE affidavit was in these words: "R. E. W. Adams, being duly sworn, on oath, says, that Joel Jenks is an important witness, on the part of the above defendant, in the trial of the above cause, and that he cannot safely proceed to trial without his testimony; and that he expects to prove by said Jenks, that said plaintiff was to give said defendant \$150, for one half of the claim mentioned in said defendant's account of set-off; and this deponent further says, that a subpoena was issued to the sheriff of DeKalb county, in which Jenks had formerly been residing, and this deponent is now informed by the coroner

Adams v. Colton.

Wann v. McGoon.

of said county, that there is no sheriff in said county, and that he, said coroner, received the said subpoena, and made search for said Jenks, but could not find him—he having removed from said county, which was unknown to said deponent. And this deponent says he knows of no person whose attendance can be procured at this term of the court, by whom he can prove said facts, and this deponent further says, that he expects to be able to procure his attendance at next term. And this application is not made for delay, but that justice may be done.”

The Circuit Court overruled an application for a continuance based upon this affidavit.

BROWNE, J.—This affidavit clearly shows that every requisite of the statute was complied with, for the purpose of getting the cause continued. Diligence has been used; the name and residence of the witness, and what particular fact to be proved—all these facts appear in the affidavit. (b)

Judgment reversed.

Newkirk and Butterfield, for plaintiff.

Osgood, for defendant.

(a) As this may be regarded as the first and leading case as to the right of a party to a continuance of a cause on account of an absent witness, I append Mr. Butterfield's argument, which shows truly and tersely what the common law was; viz.:

Mr. Butterfield said, at common law, the questions which arise on a motion for a continuance on account of the absence of a witness, are:

1. Is the witness material?

2. Has the defendant been guilty of *laches*?

3. Can the witness be procured at the next term? 8 Johns. Dig., 498; 7 Cowen, 369.

Our statute only alters the common law in requiring facts to be set out.

The statutes of the State, relative to continuance, are in these words:

“And whenever either party shall apply for the continuance of a cause, on account of the absence of testimony, the motion shall be grounded on the affidavit of the party so applying, or his, her, or their authorized agent, showing that due diligence has been used to obtain such testimony, or the want of time to obtain it; and also the name and residence of the witness, or witnesses, and what particular fact or facts the party expects to prove by such witness or witnesses; and should the court be satisfied that such evidence would not be material on the trial of the cause, or if the opposite party will admit the fact or facts stated in the affidavit, the cause shall not be continued.”—Cooke's Statutes, page 260, sec. 9.

All of the cases decided upon the construction of this statute, are collated in 2 Scam. R.

(b) “Exceptions taken to opinions or decisions of the Circuit Courts *overruling* motions for continuances of causes, shall be allowed, and the party excepting may assign for error any opinion so excepted to.”—Cooke's Stat., 264, sec. 28.

Prior to this statute, motions for continuances on account of absent witnesses, were addressed to the discretion of the inferior tribunal, and the denial of the motion could not be reviewed in the Supreme Court.

WANN v. MCGOON.

2 Scam. R., 74-77.

Appeal from the Municipal Court of Alton.

1. If a demurrer to defendant's pleas is sustained and the defendant repleads or amends, he waives his demurrer.

Wann v. McGoon.

Brookbank v. Smith.

2. So, if after demurring to a replication, and taking the judgment of the court thereon, he rejoins to the replication—this constitutes a waiver of the demurrer.

3. If, on motion of the defendant, a *capias ad respondendum* is quashed and the bail bond cancelled or the bail discharged, the court cannot dismiss the suit, but the *capias* will be regarded as a summons.

4. An uncertain plea—*ex. gr.*, a plea of failure of consideration, which does not, certainly, describe the subject matter of the agreement between the parties—is bad on demurrer.

5. Duplicity in pleading is a ground of demurrer.

6. Where the consideration of a note was the sale of land, a plea of failure of the consideration must describe the land.

7. In an action upon a note given for land, a plea alleging that the plaintiff represented that he had a good title to the land, and that he had no wife; and averring that he had no title and had a wife, is bad for duplicity.

Judgment affirmed.

Cowles and Krum, for appellants.

Shields and Kærner, for appellee.

BROOKBANK v. SMITH.

2 Scam. R., 78-79.

Error to Bureau.

1. THE decision of the Circuit Court *granting* a new trial cannot be assigned for error in the Supreme Court.

2. The statute which requires a defendant to bring forward all of his set-offs in a suit before a justice of the peace, which do not exceed the jurisdiction of the justice is peremptory; and if the defendant fails to make such defence before the J. P., he cannot avail himself of the statute for the first time upon the trial of the appeal in the Circuit Court.

Judgment affirmed.

O. Peters, for plaintiff.

Purple, for defendant.

 Field v. The People *ex rel.* McClernand.

FIELD v. THE PEOPLE *ex rel.* McCLERNAND.

2 SCAM. R., 79-185.

Appeal from Fayette.

1. The principal point decided in this case was, that inasmuch as the respondent, Field, was appointed to office in 1829, under a constitution which authorized the *appointment* of a Secretary of State, but was silent as to the tenure of the office, the secretary held his office "*during good behavior*," and could not be removed from office by the successor of the governor who appointed him, except for cause, and consequently that a removal of the respondent from his office, by a succeeding governor, was void.
2. Where a constitution, or statute, creates an office, and is *silent* as to the *term* or *tenure* of the incumbent's right, the latter holds the office *during good behavior*, which is *equivalent* to a life office, unless cause of removal is *alleged* and *proved*.
3. The constitution of Illinois is to be regarded as a *limitation* upon the power of the *legislative* department, but must be treated as a *grant* of power, to the judicial and executive *branches* of the State government.
4. The distinction is made, in this cause, between *express* and *implied* power.
5. Where a power of appointment to office is *expressly* conferred, it does not necessarily *imply* a power of *removal*.
6. Where the constitution is silent as to the *tenure* of an office, the legislative department may fix it; but if that body fail to exercise the authority, the *courts* will treat the officer as holding "*during good behavior*."
7. A life office cannot ordinarily exist under our constitution.
8. Legislative construction of a constitutional principle, although entitled to weight, is not obligatory upon the courts.
9. Where a constitution confers a general power, everything essential to the exercise of such power is necessarily implied.
10. Where a constitutional provision is plain or clear, *construction* is a dangerous argument.
11. The Supreme Court of the State, under the constitution, is the *supreme arbiter* as to all inferior tribunals.
12. Those clauses of the State constitution, of a general character, which confer power upon the legislative and executive departments of the government, and which distribute the inherent powers of the people amongst the legislative, executive and judicial departments of the government, are to be regarded simply as *declaratory of first principles*, and directory to the several departments.

THE facts were, that Field, the respondent, was legally appointed secretary of the State of Illinois, in the year 1829, and continued to exercise that office ever since. In August, 1838, Thomas Carlin was elected Governor of said State, and duly inaugurated as such. On April 1, 1839, Governor Carlin appointed the relator, McClernand, Secretary of State. Field declined to surrender the possession of the office to McClernand, and thereupon McClernand sued out a writ of *quo warranto* to test his title to the said office, and the decision of the inferior court was in his favor.

Judgment reversed.

Walker, Butterfield, Field, and Davis, for appellant.

J. B. Thomas, Douglas, Shields, McClernand, and
attorney-general Kitchell, for the appellee.

Conradi v. Evans.

CONRADI v. EVANS.

2 SCAM. R., 185-186.

Appeal from St. Clair.

1. The practice of the court is the law of the court.
2. The Circuit Courts have power to establish rules of practice.
3. In this cause, according to the rule of court, the plea to the action ought to have been filed by the morning of the third day of court; instead of this, a demurrer was filed to the declaration; this demurrer was regarded as *frivolous*, and, of course, overruled. The court gave judgment for the plaintiffs. The judgment was rendered upon the fourth day of the term. The only answer to the motion for judgment was, that a plea had been filed on the day preceding, after the overruling of the demurrer, and after the rule to plead had expired. The court held that leave to plead was necessary.
4. When a demurrer to a declaration is overruled, it is the duty of the defendants to ask leave to plead; if they neglect to do so, the Circuit Court may render a judgment upon the demurrer, or one of *nil dicit*.
5. An illegal plea may be stricken from the files, upon motion.

LOCKWOOD, J.—This was an action of *assumpsit* brought in the St. Clair Circuit Court, by Evans and Dougherty, against Conradi and Hilgard, on an assigned promissory note. The declaration is in the usual form. The defendants below demurred specially, and the plaintiffs joined in demurrer. After argument in the court below, the demurrer was overruled and decided to be frivolous; whereupon the Circuit Court gave interlocutory judgment for the plaintiff, and ordered an assessment of damages. Upon the report of the clerk, final judgment was given for the plaintiffs below, for the sum assessed by the clerk.

By a bill of exceptions, contained in the record, the following facts also appear: "That when this cause was called on, motion of the attorney for the plaintiffs, for a judgment for a default of plea, on the fourth day of the term, it was objected by the defendants' counsel, that there was a plea filed in the case, the day before. The plaintiffs' counsel thereupon insisted, that, as the rule of court had not been complied with, by filing a plea by Wednesday morning, but, instead thereof, a demurrer, which had been adjudged by the court frivolous, and that no leave had been granted, to withdraw said demurrer and file a plea; it was therefore ordered by the court, that said plea, so filed without leave, be taken from the files, and considered as no plea, and that judgment be entered for the plaintiffs as for want of a plea, or by *nil dicit*."

The appellants contend, 1st, That leave to file a plea after demurrer, is of course; 2d, That a plea having been filed at the calling of the cause, the court could not give judgment for default of a plea; and, 3d, That a court cannot direct a plea, which has been regularly filed in a cause, to be withdrawn from the files.

This court, in the case of Clemson and Waters against the State Bank of Illinois, decided, that when a plea is filed, the plaintiff either

Conradi v. Evans.

Kinzie v. Chicago.

replies by taking issue, or setting up new matter in avoidance, or demurs. If the plaintiff demurs to the defendant's plea, the law arising in the case is referred to the court; and if the plea furnishes no legal defence to the action, the judgment is either interlocutory or final, according to the nature of the action. The only mode given to the defendant, to contest the facts set out in the declaration, is by applying to the court for leave to withdraw the bad plea, and plead *de novo*; which application rests in the sound discretion of the court to grant or refuse. No motion having been made for leave to withdraw the plea, and plead again, the defendant elected to abide by the goodness of his plea, and he cannot now assign for error, that the court ought to have given judgment of *respondeat ouster*. The principles decided in this case, justify the practice pursued in the court below. The defendants below, not having obtained leave to withdraw their demurrer, elected to stand by it; and, of course, their subsequently filing a plea, without leave of the court, was irregular, and the court correctly decided, that it should be taken from the files of the court.

Judgment affirmed.

Shields, for appellants.

L. Trumbull, for appellees.



KINZIE v. CHICAGO.

2 Scam. R., 187.

Appeal from Cook.

1. A lease made by a municipal corporation unauthenticated by the common seal, is illegal.
2. The mode pointed out in the charter of incorporation, of authenticating a corporate act, must be strictly pursued, no substitution is permissible.
3. Where a promissory note was given as the consideration of a lease, and the lease was illegal and void for want of a seal, a plea setting forth the facts is a bar to the action.
4. This was the case of a lease of wharfing privileges in Chicago.

SMITH, J.—This was an action of *assumpsit* on two promissory notes, made by Kinzie, and indorsed to the trustees.

The declaration is in the usual form. The defendant, in the Circuit Court, pleaded nine several pleas, some of which averred special matter, and a want of consideration, and failure of consideration for the making of the notes, while others averred a want of power in the trustees to make two certain leases, for which it is alleged the notes were given. The fifth plea states, that the notes were given for two leases, made by the trustees to the defendant, for the wharfing privileges in front of lot No. 1, and twenty feet on the east side of lot 2,

in block 2, in the original town of Chicago; and that the said cases were illegal, null and void; and that, therefore, there was an entire failure of the whole consideration on which the notes were founded.

The trustees replied to the first, second, fourth and fifth pleas of the defendant, by setting out the two leases in *hæc verba*; and averred that the execution and delivery to the defendant of their leases, were the considerations upon which the notes were given, and for the further purpose of securing the payment of the rent then due.

To this replication there was a demurrer, and special causes of demurrer, besides general ones, were assigned.

It does not, however, become important to notice those special causes, nor to state the other portions of the pleadings in the cause, as we apprehend the case will turn on the question of the legality of the two leases set out in the replication. If those leases are void, then there can be no doubt that the Circuit Court ought to have rendered judgment for the defendant on the demurrer.

By the "*Act*" of February 11th, 1835, "*to change the corporate powers of the town of Chicago*," it is declared, that the individuals therein named, and their successors, shall be a body politic and corporate by the name of the "Trustees of the town of Chicago," and that they shall have a common seal. The trustees, then, being a body corporate, the invariable rule is, that such body can act only in the mode prescribed by the law creating it. This was so held in the case of *Betts v. Menard*, decided in this court, December term, 1831. Testing the execution of the leases by this rule, it will be seen that these leases are void for want of the corporate seal being affixed to them. In the mode of execution adopted, it is declared, in phraseology peculiar to itself in this case, that the parties have "interchangeably set their hands and seals in duplicate" to the leases. The signatures of the trustees follow, and then Kinzie's signature, to whose name a seal is attached. No seals are attached to the names of the trustees; but a single seal is placed to the left of the signatures of the trustees.

It is therefore apparent, that it is not the seal of the corporation. It is neither so declared, nor does it seem so to be, in point of fact. The mode of assenting to and authenticating acts of a corporate body, which uses a seal, is to affix the seal, with a declaration that it is the seal of the corporation, and to verify the act by the signatures of the president and secretary of the corporation.

The law, then, recognizing no other mode of authenticating instruments, like those in question, by the corporation, and being confined

Kinzie v. Chicago.

The People v. Pearson.

to this mode, and it not having been adopted, it is most certain, that the leases are a nullity, and conferred no rights whatever.

Judgment reversed.

Grant and Scammon, for appellant.

Ford, for appellees.

THE PEOPLE v. PEARSON.

2 SCAM. R., 189.

Mandamus.

1. A writ of mandamus lies to compel a Circuit judge to sign and seal a bill of exceptions, which presents the true history of the facts and exceptions.
2. Where a respondent fails to answer an *alternative* writ of mandamus, the Supreme Court, upon proof of service, will award a peremptory writ.
3. A bill of exceptions should contain all of the facts which the party excepting deems material, and which were established upon the trial.
4. It is the better practice to prepare a bill of exceptions as the cause proceeds, when the facts are fresh in the minds of the judge and counsel.
5. The signing and sealing of a bill of exceptions is a *ministerial* act.
6. If a bill of exceptions is true, it is the duty of the judge to sign and seal it.
7. The Supreme Court of Illinois possesses a general supervisory control over all inferior tribunals, and in the exercise of this power may award a mandamus, or such other common law process as the exigency of the case demands.

SMITH, J.—An *alternative mandamus* having issued to the judge of the Seventh Judicial Circuit, and he having made no formal return to the writ, nor returned the writ itself, but, through the medium of counsel, filed what purports to be an argument against the power of this court to take cognizance of the case; the court are compelled to treat the case as one in which its authority has been disregarded.

It does not, however, become necessary for the purpose of the execution of its final order to resort to any other mode, than to consider the answer filed as an insufficient compliance with its mandate, contained in the *alternative writ of mandamus* heretofore awarded, and therefore to award a peremptory writ, directing the signing the bill of exceptions required by the first writ.

If the judge had been of opinion that the bill of exceptions he was required to sign was objectionable, or contained matter which was not excepted to, or the same was untruly or incorrectly stated in the bill, he should have returned the causes of his objections; and this court would not compel the signing of a bill, which did not truly state the facts as they occurred at the trial.

We have looked into the grounds assumed by the judge, in his argument, and recurred to such cases as have occurred, within our reach at this time, having a bearing on the power of superior tribunals

over the duties and acts of inferior ones, and the right of compelling the execution of duties and acts by writ of *mandamus*. A reference to some of the principal ones will be made, to show the principles on which they have been granted; and how far they may either bear on the present question, or exempt it from their operation. The Supreme Court of the State of New York has assumed a general supervisory power over other courts of the State, similar to that of the King's Bench in England, and they have most generally confined the exercise of the power to grant writs of *mandamus*, to clear cases of ministerial duty. In the case of *Wilson v. City of Albany*, the judges said that wherever a discretionary power was vested in an officer, and he had exercised that discretion, they would not interfere, because they would not control and they ought not to coerce that discretion.

In Gilbert's case, the court refused to issue a *mandamus* to require the Court of Common Pleas to strike out certain conditions, which it had thought proper to annex to one of its orders. The same court refused to compel the Court of Common Pleas to hear charges against a justice of the peace. It has, however, awarded writs of *mandamus* against judges of the Common Pleas to compel the signing of bills of exceptions, in several cases. In Pennsylvania, the Supreme Court of that State, which is one of general, appellate jurisdiction, has refused to say whether it will issue, in any case, a *mandamus* to a court of common pleas.

Out of twenty applications made to the Supreme Court of the United States, since its organization, but five have been granted. These cases are, *United States v. Olmstead*, 5 Cranch, 115; *Livingston v. Dergenions*, 7 Cranch, 577; *Ex parte Bradstreet*, 7 Peters, 634; *New York Insurance Co. v. Wilson*, 8 Peters, 291; *Kendall v. United States*, 12 Peters, 524.

The results to which the court came in these cases are: 1. To issue a *mandamus* to a district judge, to execute a decree of his court, in an admiralty case where execution had been delayed on account of the extraneous interposition of a State law. 2. To proceed to a final judgment, and not stay proceedings indefinitely. 3. To reinstate a suit dismissed, on motion, after issue joined, so that the parties might have final judgment. 4. To sign judgment on the record, where it had been previously recovered, and entered according to law. 5. To compel the Postmaster General to enter a credit to individuals, awarded to them by the solicitor of the United States treasury, in pursuance of an act of Congress, the act being definite and purely ministerial. The principle established by some of these decisions is, that there must be a suit pending in the court below; and that the act

which the inferior court is required to perform, must be ministerial in its character, and necessary to the final termination of the cause in that tribunal. The fifteen cases in which that court refused applications for writs of *mandamus* are: United States v. Lawrence, 3 Dallas, 42; Marbury v. Madison, 1 Cranch, 137; *Ex parte* Burr, 9 Wheat., 529; Bank of Columbia v. Swaney, 1 Peters, 567; *Ex parte* Crane, 5 Peters, 190; *Ex parte* Roberts, 6 Peters, 216; *Ex parte* Davenport, 6 Peters, 661; *Ex parte* Bradstreet, 8 Peters, 588; the same, 4 Peters, 102; New York Insurance Co. v. Adams, 9 Peters, 573; Postmaster General v. Trigg, 11 Peters, 173; *Ex parte* Story, 12 Peters, 339; Poultney v. Lafayette, 12 Peters, 472; *Ex parte* Hennen, 13 Peters, 230.

The principles established in these cases, in regard to this writ, are these. The Supreme Court will never compel an inferior court, in which a suit is pending, to do an act relating to either the practice of the court, or the merits of the case, in regard to which act the inferior court is invested with a judicial discretion, even if they are of opinion that the court erred in the exercise of that discretion.

In the case of Bradstreet, which was a rule against a district judge, to show cause why a *mandamus* should not issue to compel him to sign a bill of exceptions, Chief Justice Marshall, who delivered the unanimous opinion of the court, said, "This is not a case in which a judge has refused to sign a bill of exceptions. The judge has signed such a bill as he thinks correct. If the court has granted a rule on the district judge to sign a bill of exceptions, the judge would have returned that he had performed that duty. But the object of the rule is to oblige the judge to sign a particular bill of exceptions, which had been offered to him.

"The court granted the rule to show cause, and the judge has shown cause by saying, that he has done all that can be required from him; and the bill offered to him is not such a bill as he can sign. Nothing is more manifest than that the court cannot order him to sign such a bill of exceptions. The person who offers a bill of exceptions, ought to present such a one as the judge can sign. The course to be pursued, is either to endeavor to draw up a bill, by agreement, which the judge can sign, or to prepare a bill to which there will be no objections, and present it to the judge." The Chief Justice further observes, "that there is something in the proceedings which the court cannot sanction," and remarks on the time and manner of the course pursued in the case, and then indicates the course which ought to be pursued, which is not necessary to be detailed.

The principles, however, settled in this case, seem to be, that a *mandamus* will be allowed to cause a judge to sign a bill of excep-

tions; but that the judge must determine its accuracy, and whether it correctly recites the points made, and opinions excepted to; that he must sign such a one as he believes to be correct and none other; that he cannot refuse to sign a bill altogether, but must sign one if required, in a case where there has been exceptions taken, provide it is applied for at the proper time. Our statute allowing exceptions to the opinion of the court, requires the exception to be taken at the trial, and declares it shall be the duty of the judge to allow, and seal, and sign the same. We suppose it would best comport with the accuracy and regularity of proceedings, in such cases, if the practice were to conform to the intentions of the law; and that much unnecessary difficulty might be avoided, by reducing, in the language of the law, the exceptions to "the opinion of the court to writing, during the progress of the trial," and have it completed while the transaction was in the memory of all the parties interested. No difficulty could then occur; and thus much disagreement would be avoided. It must, also, be conceded, as settling the rule, that the act of signing, and approving the bill, is in its nature ministerial, though a legal discretion is in some measure to be used, in determining the character of the bill to be signed, inasmuch as it is not every bill which may be presented, that the judge would be bound to sign. We see, then, by the character of the cases cited, where this discretion commences, and where it terminates; to what cases it may be arranged, and in what it cannot be claimed. In looking into the present case, it appears the judge has signed a bill of exceptions; but the party complains that he has not inserted certain portions of the deposition of the witness, which he excluded from being read on the trial, and to which order of the judge, excluding those portions, he took the exceptions. Now, had the judge offered explanation of a satisfactory character, why he could not sign the bill presented, with the excluded portions of the depositions, nothing would have been more certain, than that this court would not compel him to sign a bill which he could not, in his judgment, properly do, in the correct and faithful discharge of his duties. Had he made a return to the writ, and given this explanation, as in the case referred to in the Supreme Court of the United States, of Judge Concklin, we should have said he had done all that can be required of him.

The law makes him, and properly so, the judge of the propriety and accuracy of the act he is called on to solemnly verify the truth of, so that it shall become a part of the record in the cause; and it is not for other parties to determine the truth. He acts under the solemnities of an oath, and the strong presumption that he will faithfully and

honestly perform his duties. That he will not violate the obligations imposed on him for their faithful discharge. In the absence of such a return, with such explanatory reasons for a refusal to sign the bill of exceptions required by the party, we are bound to award a peremptory *mandamus* to cause the signing of the particular bill of exceptions exhibited ; and it is awarded accordingly.

Peremptory writ awarded.

Scammon, for relator.

Pearson, *pro se*.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS.

IN JUNE TERM, 1840, AT SPRINGFIELD.

STATE *v.* EVANS.

2 SCAM. R., 208.

Error to Edgar.

1. In assessing damages for a right of way over private estates for the use of the public, the benefits arising out of the *construction* of a public work, as contra-distinguished from its mere *location*, may be set off against the value of the land taken.
2. The benefit which may be set off, must be to the land taken, and not the increased value given to private lands generally, arising out of the location and construction of a great public work, or a system of public improvement.

WILSON, C. J.—Under the Internal Improvement law, Alexander, as one of the commissioners of the board of public works, located a railroad over the land of John Evans; and upon a claim for damages, made by Evans, on account of the construction of the road over his land, a trial was had to ascertain the amount of damages Evans was entitled to recover, under the provisions of the act of 1833, “*Concerning the Right of Way*.” On the trial a question arose, as to the rule by which the jury should be governed, in assessing the damages of the claimant. The commissioner offered to prove the enhanced value of the land and timber of the claimant, by reason of the location of the road through his land. This evidence the court rejected, and decided that the proper question to be put to the witness, was, “Is the injury done to the land and timber of the claimant, by the construction of the road, greater than the benefit, and if so, how much?” The court also decided, “that the supposed enhanced value of the land, by the location of the road, was not to be taken into the account.” To this opinion the agent of the State excepted.

Upon a view of the whole of this case we are of opinion that the decision of the court was correct. The law authorizing the taking of the land of an individual, by authority of the State, for the construc-

tion of a road or other public works, provides, that when the damages claimed by the owner of the land cannot be agreed upon by him and the agent of the State, that the same shall be assessed by three householders; and if their decision is not satisfactory, either party may take an appeal to the Circuit Court. The criterion of damages is the same in either mode of assessment, and is clearly pointed out by the oath required to be taken by the assessors, which is, "that they shall assess the damages which they shall believe such owner or owners will sustain, over and above the additional value which such land will derive from the construction of such road." According to this oath, it will be perceived that the assessors are to take into consideration the probable increase of value that will accrue to the land of the claimant from the construction of the road. It is not the benefit that will accrue from the location of the road, that they are to inquire into. It is the benefit which will result from its construction, that they are to ascertain.

The law does not contemplate so improbable a contingency as that the mere survey or location of a road, that may never be made, will enhance the value of land contiguous to it.

By the appropriation of the land of an individual to the use of the public, under the Internal Improvement law, and the law "*Concerning the Right of Way*," the land thus taken becomes vested in the State upon payment of the damages; and the original owner is from thenceforth divested of all right and title to the land. In justice, and in law, therefore, he should receive full compensation; the measure of which would be, not merely the value of the land of which he has been deprived, but, also, all damage which may result from the appropriation and use of his land, by the State; such, for example, as the breaking up or destruction of a convenient arrangement of his farm, or the necessity of additional fencing, etc. In short, every injury and inconvenience sustained by the claimant, constitutes an item of the aggregate amount of damage which he is entitled to recover.

On the other hand, it is with equal justice required that the additional value that may be given to the land of an individual, by the construction of a public road or canal over it, shall be taken into consideration, and if it is believed by the assessors to be equal to or greater than the estimated damage the owner will sustain by reason of the construction of the road, etc., he will, in that event, be entitled to recover nothing. But if the enhanced value of the land retained shall fall short of the damage incurred by the owner, then he will be entitled to the difference between the injury sustained, on the one hand, and the benefit received on the other.

State v. Evans.

Spraggins v. Houghton.

This rule, prescribed by law, for the assessment of damages, when private property is taken for the use of the public, is an equitable one. The immediate benefit the individual may derive is offset against the injury inflicted. It has been contended, however, that the increased value which the system of Internal Improvements was supposed to give to lands generally, should also be taken into consideration, and offset against the damages sustained by the appropriation of private property for public use; but such a rule would be unjust and partial.

If an additional value is given to all the lands in the country by the Internal Improvement system, the benefit is, and should be common, inasmuch as it is acquired at the common expense; but this would not be the case, if one man is required to give up a portion of his land for this general advantage, in addition to the payment of his proportion of the expense of the system.

Judgment affirmed.

Linder, for plaintiff.

Ficklin, for defendant.



SPRAGGINS v. HOUGHTON.

2 Scam. R., 211-215.

Appeal from Jo Daviess.

Where the Supreme Court have reason to believe that a cause brought before it is fictitious, they will require the production of proof that it is a *bonâ fide* suit, involving private rights.

A MOTION was made by the appellant to dismiss the *original* action because it was a fictitious one.

The following order was made upon the motion by

SMITH, J.—For these causes, and upon the authority of the case of *Shields v. McConnell*, which has been dismissed at the present term, upon the ground of being a feigned case, the motion of the appellant is continued until the next term; and, in the meantime, it is further ordered that the parties to this suit produce and file in open court, on the first day of the next term thereof, authentic documentary evidence, where the same exists, of the facts stated in the agreed case, and of all other facts therein, which do not so exist on paper, but of which oral proof may be had, and that they at the same time produce and file written depositions of competent persons to the truth thereof; and that, in default thereof, this cause be remanded to the Circuit Court of Jo Daviess county, with directions to that court to vacate the judgment entered therein, and to dismiss the same, each party paying his own costs.

Ellett v. Todd.

Mastin v. Toncray.

Kimball v. Kent.

ELLETT v. TODD.

2 Scam. R., 214-215.

Appeal from the Municipal Court of Alton.

WHERE a party is prevented from performing a contract because of the willful or negligent conduct of his adversary, he may recover the damages sustained thereby, though nothing has been done under the contract except making preparations to execute it.

*Judgment affirmed.**Cowles and Krum, for appellant.**G. T. M. Davis, for appellees.*

MASTIN v. TONCRAY.

2 Scam. R., 216-217.

Error to Schuyler.

WHERE a plaintiff declares in assumpsit upon a contract made between the defendant and himself, whereby the defendant was, for a consideration, to deliver the plaintiff *the pork of nineteen hogs*—and upon the trial it was proved that the contract was to deliver *all of the pork the defendant could spare*—*held*, a fatal variance.

*Judgment reversed.**Richardson and Maxwell, for plaintiff.**Logan, Baker and Semple, for defendant.*

KIMBALL v. KENT.

2 Scam. R., 217-218.

Error to La Salle.

1. WHERE a declaration is filed ten days before the return term of the process, but the plaintiff omitted to file therewith a copy of instrument or account sued on, and the cause was continued to a subsequent term, at which time the cause was dismissed because of the omission to file the copy of the cause of action—*held*, this was error.

2. In order to justify the dismissal of a cause for a neglect to attach to the declaration a copy of the cause of action, in *suits ex contractu*, the defendant must first take a rule upon the plaintiff to comply with the statute.

*Judgment reversed.**Spring, for plaintiff.**Peters, for defendant.*

Thornton v. Henry's Heirs.

THORNTON v. HENRY'S HEIRS.

2 SCAM. R., 218-221.

Error to Shelby.

1. Part performance of a parol contract for the sale of land, withdraws the case from the operation of the statute of frauds. (a)
2. Payment of the purchase, and delivery of the title deeds and possession, are decisive as acts of part performance.
3. *Semble*. The statute of frauds must be specially relied upon in an equity cause where a parol contract for the sale of land is sought to be enforced, if either party resists the right under the statute. (b)
4. A guardian *ad litem* for infant defendants, should deny the allegations of a bill in equity exhibited against his wards.
5. If the guardian admits the allegations of the bill, ordinarily the court will set aside, or treat as a nullity, the answer. (c)
6. But where, upon the final hearing of an equity cause, it appears that the bill is true, weight will be attached to the admissions of the answer, when the equities are with the complainant upon the whole record; at least the Supreme Court will not reverse a just decree for this error of the guardian and court below.

LOCKWOOD, J.—William F. Thornton filed a bill in chancery in the Shelby Circuit Court, setting forth in substance, that on the 6th day of February, 1836, the said Thornton and James B. Henry, since deceased, entered into a bargain for the sale and purchase of lot No. 3, in Block No. 6, in the town of Shelbyville, whereby said Henry sold, and agreed to convey, to said Thornton said lot, and to give him a warranty deed for the same. That said Thornton was to give, and did give and pay said Henry therefor, the sum of fifty dollars, in full consideration for said lot. That at the time of the sale and payment for said lot, said Thornton took possession (by consent and direction of said Henry) of said lot, and also of the title deeds to the same, and now has possession thereof. That said sale was by a verbal agreement, and not in writing, but that the title deeds were given up to said Thornton, to enable him to fill out a deed to himself; but the said deed was neglected to be made for a few days, and in the meantime the said Henry died, without executing any deed for the lot. That Sophia Henry, the wife of said James B. Henry, was administratrix, and James W. Vaughan administrator of his estate, and that the other defendants were the children, and infant heirs of said Henry. The bill prays that a guardian *ad litem* be appointed for the infant heirs, and that a decree be made, requiring the defendants to execute a deed for the lot of land, and for such other relief as said Thornton may be entitled to.

Subsequently to the return of the summons duly served on all the defendants, a default was entered against Vaughan and Sophia Henry, the wife of the said James B. Henry, for want of a plea; and at the same time a guardian *ad litem* was appointed for the infant defendants, who answered that the facts set forth in the said bill are true; and that they have nothing to say why a decree should not be made as prayed

for in the bill. The cause being brought to a hearing in the court below, that court decided that, as the bill is predicated upon a verbal contract only, for the sale of land, that the bill be dismissed, and that the defendants recover of the complainant their costs, etc. The assignment of errors questions the correctness of this decision. The decision of the court below assumes the broad ground, that no acts of the parties can take a parol sale of land out of the operation of the statute of frauds, and that the parties cannot waive the statute. Without entering into the various and contradictory decisions of the English and American courts on the subject of what acts will take a parol contract for the sale of land out of the statute, there is no doubt but the current of decisions in both countries sustain the doctrine, that delivery of possession and part performance, as the payment of the purchase money, and making improvements, will take the case out of the statute. It has, also, been repeatedly decided in the English courts, that a party, to avail himself of the statute of frauds, must plead it, or rely on it in some form. We are consequently of opinion, that the court erred in dismissing the bill, on the ground that the bill only sets out a parol contract. In this case the bill alleges that the whole of the purchase money for the lot had been paid; that the possession of the lot was taken by Thornton, by the consent of Henry, and the title deeds were delivered to Thornton to enable him to make out a warranty deed for the lot.

If all these acts, together with the consent of the defendants that a decree be made in favor of the plaintiff, are not sufficient to take a case out of the operation of the statute of frauds, we are at a loss to conceive of a case where it would be proper. It is too late to say, that no parol contract for the sale of lands can be specifically enforced by a court of equity. Such a decision converts the statute of frauds into an engine of fraud. The court below, sitting as a court of chancery, being the general guardian of infants, if it had deemed it advisable, in order more effectually to protect the interests of the infants, might, doubtless, have set aside the answer of the guardian, and directed him to put in an answer requiring the plaintiff to prove the facts set out in his bill. This, we conceive, is all, under the circumstances of this case, that the court below could do, and all that justice required.

The judgment is reversed, and the cause remanded, with instructions to proceed and render a decree for complainant, or at the discretion of the court below, set aside the answer, and proceed according to the proof to be exhibited. No costs are given to either party.

Thornton v. Henry's Heirs.

Calhoun v. Webster.

Nye v. Wright.

SMITH, J.—As the statute of frauds was not relied on in this case by the defendants, I concur in the judgment of reversal, without expressing any definite opinion on the construction to be given to the statute of frauds.

*Decree reversed.**Field, Gregory and Eddy, for plaintiff.**Levi Davis, for defendants.*

(a) S. P. Updike v. Armstrong, 8 Scam. R., 564; Shirley v. Spencer, 4 Gilm. R., 600; Hawkins v. Hunt, 14 Ill. R., 48.

(b) S. P. Kinzie v. Penrose, 2 Scam. R., 521; Tarleton v. Vietes, 1 Gilm. R., 471; Switzer v. Skiles, 3 ibid. 529; Dyer v. Martin, 4 Scam. R., 151.

(c) S. P. 3 John. Ch. R., 867; 8 Ohio R., 855; 8 Peters' R., 128.

CALHOUN v. WEBSTER.

2 Scam. R., 221-222.

Error to Sangamon.

1. WHERE a term intervenes between the test and return day of original process, the writ is a nullity.

2. Writ issued November 6, 1839, return day "*third Monday of November next*," the process is void.

3. A default rendered upon void process will be reversed.

*Judgment reversed.**J. B. Thomas, for plaintiff.**A. Campbell, for defendants.*

NYE v. WRIGHT.

2 Scam. R., 222-223.

Appeal from Brown.

1. A PLEA is a waiver of a demurrer precedently filed to a declaration.

2. But the record must *certainly* show a disposition of the demurrer—the mere *recital* of an issue to the country is no waiver.

*Judgment reversed.**S. A. Douglas, for appellant.**S. T. Logan, for appellee.*

Mason v. Finch.

State v. Wilson.

MASON v. FINCH.

2 Scam. R., 223-225.

Error to Madison.

1. THE Municipal Court of the City of Alton was organized in 1837; in 1839 the law establishing said court was repealed, and the undisposed of business of said court was transferred for final disposition to the Circuit Court of Madison county. Prior to the repealing act, Finch recovered a judgment against Mason in said Municipal Court, which was unexecuted at the date of said repeal; the said Circuit Court awarded an execution upon said judgment—*held*, that the execution was regular.

2. In construing statutes, courts are to look at the language of the whole act, and if they find, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the statute, if, upon a view of the whole act, they can collect, from the more large and extensive expressions, used in other parts, the real intention of the legislature, it is their duty give effect to the larger expressions.

Judgment affirmed.

Cowles and Krum, for plaintiff.

W. Martin, for defendant.

STATE v. WILSON.

2 Scam. R., 225-226.

Error to Vermilion.

1. The court is bound to give instructions in the language used by the counsel asking them, if the instruction is in conformity with the law.
2. But if the instruction, as prayed for, is calculated to mislead the jury, the court may give an additional instruction, explanatory of the original.
3. Where, upon the whole record, it appears that justice has been done, the Supreme Court will not reverse the judgment, simply because the court below has not performed its duty in instructing the jury.
4. Rule as to assessment of damages for right of way over private estates.

WILSON, C. J.—This was a proceeding had under the act of 1833, "*Concerning the Right of Way*," etc. The land of Wilson had been taken by the agent of the State, to make a railroad over it; and upon a trial in the Circuit Court, to ascertain the damages which Wilson, the claimant, was entitled to recover, the counsel for the State moved the court to instruct the jury, "That they, in assessing the claimant's damages, were to take into consideration the additional value said land would derive from the location and construction of said road; and if it exceeded the damages done by said road's passing

State v. Wilson.

Galusha v. Butterfield.

through said land, then the jury should find in favor of the State, and allow to said Wilson nothing." This instruction the court refused to give, but gave the following instruction: "The rise of the property consequent upon the adoption of the system of internal improvement and the survey and location of the road, is not to be taken into consideration of the jury, but they are only to take into consideration the damages the land will sustain, over and above the additional value by the construction of the road." The instruction asked for was in exact conformity with the law, and ought to have been given as asked. Counsel have a right to require of the court to give an instruction as asked, when the same is in conformity with the law; and if, in the opinion of the court, the jury may not fully comprehend, or may be misled by such instruction, unless explained, it is then the province of the court to give such additional instructions or explanations, as may obviate the danger of misapprehension on the part of the jury. This practice has not been strictly pursued in this case, but the departure from it, as we are inclined to think, has been too slight to justify a reversal of the cause; particularly as no injustice appears to have been done. The instruction which the court gave was correct, and although not in the language asked for, it was substantially, and in its legal import, the same. That portion of the instruction of the court which excludes from the consideration of the jury, in estimating the damages of the claimant, the enhanced value of his land in consequence of the adoption of the internal improvement system, was not asked for, nor is its application perceived as the case is presented in the record. The instruction, however, is correct; and the presumption is, that it was rendered proper by the reverse of the proposition having been assumed and urged by counsel; and under no circumstances of the case could it work injustice.

Judgment affirmed.

Linder, for plaintiff.

Ficklin, for defendant.

GALUSHA v. BUTTERFIELD.

2 Scam. R., 227-228.

Error to Cook.

1. IN replevin the plea of *non cepit* puts in issue the taking of the goods and chattels in the prior proceedings mentioned, and not the title of the parties.

2. When the court is held at a *time* unauthorized by law, its judgments are *coram non judice*.

Galusha v. Butterfield.

Holcomb v. Illinois and Michigan Canal.

3. Where the inferior court has jurisdiction of the cause, but proceed to try it *at a time* unauthorized by law, its judgment will be reversed and the cause remanded for new action.

Judgment reversed.

Spring, Strode and Brackett, for plaintiff.

Morris and Butterfield, for defendants.

HOLCOMB v. ILLINOIS AND MICHIGAN CANAL.

2 Scam. R., 228-231.

Error to Will.

1. Where relevant and pertinent questions are propounded to a witness, it is erroneous for the inferior court to refuse to permit an answer thereto, and a bill of exceptions lies.
2. Where parties, by their counsel, agree that certain evidence shall be received upon the trial of a cause, it is error if the court reject it when offered.
3. Where a corporation is sued, the reports of its officers are evidence against them, if accurate and authentic.
4. Where an action of covenant is brought, and the defendants plead *non est factum* and verify their plea by affidavit, the *onus* as to the execution of the covenant is upon the plaintiff, and evidence tending to prove the execution of the agreement which contains the covenant, is admissible.
5. The power of a corporate body to make a contract cannot be questioned under the plea of *non est factum* in an action of covenant.
6. The Circuit, or other inferior court, cannot compel a plaintiff to become *nonsuited*; in other words, a compulsory *nonsuit* is not allowable.
7. If a corporate body has not provided a common seal, but have allowed their chief officer to affix his private seal as evidence of a contract, this is binding upon the corporation.

THE facts were as follows, as shown by the bill of exceptions which is recited at large, with the exception of the covenant (which was a contract for hire and reward to perform certain work and labor, by the plaintiff, for the defendant).

"Be it remembered that the above cause came on for trial, a jury being empannelled for that purpose; upon which the plaintiff offered to read as the first evidence, an instrument of which the following is a copy: 'Articles of agreement made and entered into this third day of December, A.D. 1836, by and between Zephaniah Holcomb of the one part, and the board of commissioners of the Illinois and Michigan Canal of the other part, witnesseth, etc.

(The particular covenants are omitted.)

"In witness whereof the said parties have hereunto set their hands, and affixed their seals, at Chicago, this third day of December, A.D. 1836.

"ZEPHANIAH HOLCOMB. [Seal.]

"Signed, sealed, and }
delivered in presence of }

"W. B. ARCHER, *Acting Com.*' [Seal.]

Holcomb v. Illinois and Michigan Canal.

"To the reading of which defendants objected, which objection is sustained, and the instrument not permitted to be read as evidence under the plaintiff's declaration.

"The plaintiff then called and had sworn as a witness, Joel Manning, and asked this question: 'Were you the secretary of the Canal Board of the Illinois and Michigan Canal, in 1836?' which question was objected to by the defendants, and sustained by the court. The plaintiff then asked witness: 'Was William B. Archer, in 1836, the acting commissioner of the Illinois and Michigan Canal?' objected to by defendants, and sustained by the court. The plaintiff then asked witness: 'Had the board of commissioners of the Illinois and Michigan Canal, on the third of December, 1836, at the date of this instrument (holding it up), any corporate seal?' objected to by defendants, and sustained by the court. Next question by plaintiff: 'Is that (holding it, the instrument, up) the handwriting of William B. Archer?' objected to by defendants, and sustained by the court. The plaintiff then asked witness: 'Was the contract marked "A," and shown to the witness, executed in the presence of the witness or not?' objected to by defendants, and sustained by the court. The plaintiff then asked the witness: 'Do you know how or in what manner the board of commissioners of the Illinois and Michigan Canal executed, signed, and sealed their contracts or covenants in 1836?' objected to by defendants, and sustained by the court. Next question by plaintiff: 'If so, whether the contract shown to you and marked "A," and being the contract declared on, is signed and sealed in the same manner as others in 1836, by the board?' objected to by defendants, and sustained by the court. The plaintiff then asked witness: 'Do you know whether any payment was made by the said defendants to the said plaintiff, for work done under said contract?' objected to by defendants, and sustained by the court. The plaintiff next called Jacob Fry, and had him sworn as a witness, and put to him this question: 'Are you now the acting commissioner of the board of commissioners of the Illinois and Michigan Canal?' objected to by the defendants, and the objection sustained by the court. The plaintiff then asked the witness: 'Have the board of commissioners of the Illinois and Michigan Canal any corporate or common seal?' objected to by defendants, and which objection is sustained by the court. The plaintiff then called Joel Manning, and asked witness this question: 'Did you obtain that pamphlet (holding up a pamphlet with the names of G. S. Hubbard, William B. Archer, and William F. Thornton attached to it) from the canal office?' objected to by defendants, and sustained by the court. Plaintiff then again

Holcomb v. Illinois and Michigan Canal.

Jackson v. The People.

called Jacob Fry, and asked him : ‘ Do you know William B. Archer’s handwriting, and if you do, look upon the paper marked “A,” and say if it be William B. Archer’s handwriting?’ objected to by defendants, and sustained by the court. The plaintiff then asked witness : ‘ Whether said Archer was the acting commissioner of the Illinois and Michigan Canal on the third day of December, 1836?’ objected to by defendants, and sustained by the court. The plaintiff then again offered to read the said contract claimed to be the one declared on, in evidence to the jury, to which reading the defendants objected, and which objection was sustained by the court.

“The plaintiff then having stated he had no evidence except as offered, and was through with his case, the defendants then and there moved the court to nonsuit the plaintiff; which motion was sustained. To all of which above decisions of the court, the plaintiff excepts, and prays the court to sign and seal this bill of exceptions, which is done in open court, this 13th day of April, 1838.

“JOHN PEARSON, [Seal.]

“*Judge of the 7th Judicial Circuit.*”

Judgment reversed upon all of the points made by the bill of exceptions.

Butterfield and Collins, for plaintiff.

James Turney, for defendants.



JACKSON v. THE PEOPLE.

2 SCAM. R., 231-233.

Error to Macoupin.

Case of bigamy—both marriages solemnized in Illinois.

1. THE license of the clerk, and the certificate of the officer or minister who solemnized the marriage is evidence of the relation of husband and wife, if properly authenticated.

2. Oral testimony is admissible to prove a marriage in fact, without resorting to record evidence.

Conviction affirmed.

McDougall, for plaintiff.

Kitchell, attorney-general, for defendants.

Miller v. The People.

MILLER v. THE PEOPLE.

2 SCAM. R., 233-236.

Error to Cook.

Indictment for having in possession instruments with which to forge the current coin of the United States.

1. An indictment is sufficiently technical which sets forth the offence, in the language of our criminal code, or in such a clear manner as to enable the defendant to plead a former acquittal or conviction in bar to a second prosecution.
2. An indictment for having in possession instruments or apparatus used for forging coin, etc., need not allege the intent to be *felonious*: it is sufficient to aver that the defendant *knowingly*, and without lawful excuse, had and maintained such possession.
3. The precedent in this cause approved.

THE indictment was in these words:

“State of Illinois, Cook County, ss.

“The grand jurors chosen, selected, and sworn, in and for the county of Cook, in the name and by the authority of the people of the State of Illinois, upon their oaths present, that John B. Miller, late of said county, on the first day of December, in the year of our Lord one thousand eight hundred and thirty-seven, in the county aforesaid, one press for coinage, made of iron, otherwise called a ‘bogus press;’ one edging tool, made of iron and steel, adapted and intended for the working of coin round the edges, with grainings, apparently resembling those on the edges of coin then and now current in the State aforesaid, to wit, Mexican dollars; one die, made of steel, in and upon which then and there were made and impressed the figure, resemblance, and similitude of one of the sides, to wit, the eagle side of the coin then and now current within the State aforesaid, to wit, a Mexican dollar; one other die, made of steel, in and upon which then and there were made and impressed the figure, resemblance and similitude, to wit, the reverse of the eagle side of the coin then and now current within the State of Illinois, called a Mexican dollar; two crucibles made of clay and sand, made use of in counterfeiting the coin then and now current within the State aforesaid, to wit, Mexican dollars, without lawful excuse;—then and there knowingly had in his possession, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the State of Illinois.

“And the same grand jurors, chosen, selected, and sworn, in and for the county aforesaid, in the name and by the authority aforesaid, upon their oaths aforesaid, do further present that John B. Miller, late of said county, on the first day of December, in the year of our Lord one thousand eight hundred and thirty-seven, in the county aforesaid, one press for coinage, made of iron; one edging tool, made of iron and steel, adapted and intended for the working of coin round

Miller v. The People.

Dormandy v. State Bank of Illinois.

the edges, with grainings, apparently resembling those on the edges of coin then and now current within the State aforesaid, to wit, Mexican dollars; one die, made of steel, in and upon which then and there were made and impressed the figure, resemblance, and similitude of one of the sides, to wit, the eagle side of coin then and now current within the State aforesaid, to wit, Mexican dollars; one other die, made of steel, in and upon which then and there were made and impressed the figure, resemblance, and similitude of one of the sides, to wit, the reverse of the eagle side of coin then and now current within the State of Illinois, called Mexican dollars; two crucibles, made of sand and clay, made use of in counterfeiting the coin then and now current within the State aforesaid, called Mexican dollars, then and there knowingly and unlawfully had in his custody and possession, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the State of Illinois."

"A. HUNTINGTON, *State's Attorney.*"

Conviction affirmed.

Strode, Grant and Scammon, for plaintiff.

Onley, attorney-general, for defendants.



DORMANDY v. STATE BANK OF ILLINOIS.

2 SCAM. R., 236-245.

Error to Sangamon.

Assumpsit against a bank to recover the bills of the bank, destroyed by fire while in the hands of the holder.
Demurrer to evidence.

1. The question as to the loss of a written or printed instrument, with a view to proof of the existence and contents thereof, is for the court, and not the jury.
2. It is error to permit a plaintiff to be sworn and give his testimony to a jury, in an action upon a lost instrument.
3. No notice to the maker of an instrument, of its loss, is necessary, in order to entitle the holder to a recovery of its contents.
4. A demurrer to evidence must state the facts, and not merely the evidence tending to prove them.
5. When the defendant demurs to the plaintiff's evidence, the former cannot compel the latter to join in the demurrer, unless he distinctly admits upon the record every fact and every conclusion which the plaintiff's evidence proves, or tends to prove. In other words, a demurrer to evidence admits not only facts, but inferences from the admitted facts.
6. Where the defendant, in demurring to the plaintiff's evidence, does not distinctly admit the facts and inferences deducible therefrom, and yet obtains judgment upon his demurrer, the adjudication will be reversed, and the cause remanded for further proceedings.

THE bill of exceptions was in these words, viz.:

"Be it remembered, that on the trial of this cause, the plaintiff proved that he had in possession, on the sixth day of June, 1839, six

Dormady v. State Bank of Illinois.

or eight one hundred dollar bank bills, and other bank bills, amounting in all to eight hundred or one thousand dollars; that five or six of the hundred dollar bills were on the State Bank of Illinois, or some of its branches, and two of the one hundred dollar bills were proved to have been on one of the branches, and some of the small notes, amounting to about forty-five dollars, were on the State Bank or its branches; that this money was in a pocket-book; that the branch notes were payable at a branch, signed by the president of the State Bank, and countersigned by the cashier, and indorsed on the back by the cashier of the branch, payable to bearer.

“He further proved that he occupied a house in Springfield, the front room of which was used as a shop, the next room as a bed-room, and the next as a sitting-room, and the last back shed as a kitchen or lumber room. He further proved, that on the night of the sixth of June, two persons were called to come to Dormady’s house, one called by Mrs. Dormady, the other by another person. When they got there they saw there had been a fire in the northwest corner of the sitting-room; that the fire had been put out, but the boards were yet warm; that the fire had burned or scorched the siding or weatherboarding of the room, about four feet high, and from eighteen inches to two feet wide, and some of the floor, which was of loose boards, had been torn up, and that some pieces of a cigar-box were burnt through, which had been under the floor; that there was a hole burnt through the weatherboarding (the weatherboarding of the next house being on that side of the wall of the room), through which he could have thrust his hand, and that there were two other smaller holes burnt through, one above and one below; that there was a candle stand, which had been scorched on the top, about seven inches long, by three inches wide, and one of the feet burnt partially off; that plaintiff’s wife was in her bare feet, bringing in water; that the plaintiff appeared to be insane, and had something clasped in his hand, which was afterward seen to be the end of a pocket-book, containing the ends of nine one hundred dollar bank notes, and some smaller notes, six of which ends of notes were proven to be of the same engraving with the ends of the hundred dollar notes, issued by the defendants, and one end of a five dollar note, to be like the engraving of the five dollar note issued by the defendants; that the ends of the hundred dollar notes were pressed down to the pocket-book smoothly, and the smaller bills, lying on top, not pressed down.

“The plaintiff further proved, that one of the witnesses picked up, in the room where the fire had been, a small piece of what he took to be burnt leather, and which looked like the corner of a pocket-book,

and, on opening it, saw some light ashes, which looked like the ashes of burnt bank paper.

“Plaintiff further proved, that he applied to Col. Mather, president of the bank, to know whether we would pay the amount of the ends of the notes, or give other bills, and he replied no.

“It further appeared, from the evidence, that the ends shown as the ends of the notes, were nothing more than the engraving on the ends; and that there was no part of the number, date, names, or any part of the notes necessary for the notes to be paid at bank; but that those ends of the notes might all be taken off, and still have the complete note which would be paid at the bank. Plaintiff further proved, that, on the evening of the said sixth of June, the plaintiff took and paid for his passage to St. Louis in the stage which was to start next morning. It was also proved, that he had in his hand the end of the pocket-book, which was burnt at one end, containing the ends of the bills, which were also burnt in the same manner as the pocket-book, except that the small notes on the top were burnt further in, and were crumbled to ashes, which were five dollar notes; and that, when he opened his hand, there were new ashes in it, and his hand was dirty with ashes, as was the pocket-book also; further, that the cinders, from the burnt edge of the pocket-book, stuck out from one-eighth to half an inch; further, that the end of the pocket-book was like the one in which the money was seen in the afternoon of that day, and witness believed it to be the same.

“It was further proved, that two one hundred dollar notes, payable at the branch of the State bank, were delivered by the teller of the bank, at the counter of the bank, to the plaintiff, by way of an exchange for other notes, on the same day the witness saw the money in the pocket-book; and also, that plaintiff had previously, on the same day, got from the bank two one hundred dollar notes on the bank of Kentucky. It was also proved, that the floor of the room where the fire had been did not reach the wall by four inches.

“The end of the pocket-book, and the ends of the notes described, were produced in evidence. It was also proved, the time the witness came in, when the fire was put out, was a quarter past twelve o'clock; and the said defendants, admitting the truth of the facts, as above proved, and all inferences properly to be drawn from them, say that the said testimony is not sufficient in law to enable said plaintiff to have and maintain his said action, and recover against the said defendants herein, wherefore they pray judgment, etc.

“*Logan and Baker*, for defendants.”

Dormandy v. State Bank of Illinois.

SMITH, J.—This was an action of *assumpsit* brought to recover the amount of certain notes of the bank, of which the plaintiff was possessed, alleged to have been casually destroyed by fire, while he was the owner thereof. The case is brought to this court by writ of error. The questions presented for consideration here, arise out of exceptions taken to the opinion of the Circuit Court, on the offer to introduce certain testimony by the plaintiff, which was rejected by the court, and such as arise on a demurrer to evidence.

This is the first time any question has arisen in this court on a demurrer to evidence; and it may, therefore, be necessary to be more minute in the examination bestowed on the case, than if such questions had been heretofore considered.

Its origin and early use in courts of justice we will not attempt to trace; because it would, perhaps, be of no particular use in the determination of the questions under consideration.

It is said the practice has, on many occasions, been much misunderstood; and that courts will be extremely liberal in inferences where the party, by demurring, takes the question from the proper tribunal; and that it is a course of practice, generally speaking, not calculated to promote the ends of justice, and is liable to much abuse. As early as the time of Mr. Justice Blackstone, it had, in a great measure, been disused, because of the more frequent exercise of the discretionary powers of the courts, in granting new trials. If by a demurrer to evidence, it is understood to be its sole object to refer to the court the decision of the law arising on the facts, those facts being already admitted and clearly ascertained, and nothing remaining but for the court to apply the law, as in an agreed case, then we see no strong objection to the practice; but such certainly has not always been the case, for it seems to have been frequently much misunderstood, and to have been attempted to be greatly extended beyond such a rule.

Having promised thus much, the questions arising out of the demurrer and exceptions taken during the progress of the cause will be examined.

At the trial below upon the general issue, the plaintiff, after having by evidence established his possession of the bank bills, on the afternoon of the day of the alleged destruction of the bills by fire, offered to introduce his own testimony to prove the destruction and loss, for the purpose of admitting secondary evidence, by parol, of their contents.

The court decided that he could not testify to the court, but that his affidavit of the destruction of the bills might be made, and delivered to the court. This decision being excepted to by the plaintiff,

the defendants waived the necessity of proof of loss of the notes, and thereupon the plaintiff was permitted to prove the contents of such notes or bills. The plaintiff also offered to prove notice to the defendants of the destruction and loss of the bank notes, but the court refused to admit the evidence of notice, deciding that the evidence was irrelevant; the averment of loss, contained in the declaration, not being a material averment, and therefore not necessary to be proved:

It also appears, that the plaintiff refused to join in demurrer, because, as the record states, the defendants did not admit, on the record, the facts which the evidence conduced to prove, to wit, that the six one hundred dollar bills, and one five dollar bill, were the bills made by the defendants, and were issued by the defendants to the plaintiff, by way of exchange; and also that the remainder of the bills, the remnants of which were produced in evidence, were destroyed by fire casually. The court, however, compelled the plaintiff to join in demurrer, deciding that not anything could be stated, except the evidence; and that no fact, which the evidence conduced to prove, or which the jury might find, was to be stated on the record. Upon an examination of the case, it will be readily perceived, that the defendants have demurred to evidence of facts, not to facts themselves. What was the point in controversy? Not the possession of the notes, for which the plaintiff sought to recover the amount; for that was not only clearly established by evidence, but admitted by a waiver of the necessity of the proof of the loss and destruction of them. The main fact in controversy, was the contents of the notes destroyed, which embraced the description and amount.

Now nothing is more clear, than that the evidence of the facts deposed by the witnesses, conduced materially to prove and establish the main facts in controversy.

The defendant has not admitted, by his demurrer, those facts, which the evidence so conduced to prove, and asked the judgment of the court on the law arising thereon; that is, whether the plaintiff, on such admission by the demurrer, that the notes were notes of the bank, and amounted to the sum contended for, taken in connection with the other evidence in the cause of ownership, is entitled to recover; but he has sought the judgment of the court on the testimony whether it proved the notes destroyed were those alleged to have been destroyed casually by fire; and whether they amounted to the sum claimed. Thus seeking to compel the court to perform not its appropriate function, but that of the jury, the questions being purely matters of fact.

We thus see that the counsel for the defendants have mistaken the office of a demurrer to evidence. It is stated by elementary writers, and will be found to be distinctly asserted in books of practice, that where the evidence offered consists only of a record or other matter in writing, the adverse party may insist on demurring to the evidence, and the party offering it, must either join in demurrer, or waive the evidence; and the reason is, that there cannot be any variance of matter in writing; so where the evidence is by parol, it has been said, that if it be certain and determinate, the party may demur and oblige his adversary to join in demurrer.

Where, however, it is loose, indeterminate, and circumstantial, it is otherwise. In such cases the party offering the evidence will not be compelled to join in demurrer, unless the demurrant admits the evidence of the fact; or where it is circumstantial, unless he distinctly admits, upon the record, every fact and every conclusion which the evidence conduces to prove. He may, however, join in the demurrer, and then every fact is to be considered as admitted, which the jury could infer in his favor, from the evidence demurred to. It is thus seen that the court erred in its opinion of the law of demurrer to evidence and its power to compel joinder to a demurrer. In order, however, to show more clearly, if possible, the true principles applicable to a case like the present, it will be proper to quote freely from an opinion of the Supreme Court of the United States, delivered by Mr. Justice Story, in which the rules are most clearly and explicitly laid down. In the case of *Fowle v. The Common Council of Alexandria*, which was an action originally brought in the Circuit Court sitting at Alexandria, in the District of Columbia, to recover damages asserted to have been sustained by the plaintiff, in consequence of the neglect of the defendants to take due bonds and security from one Marsteller, licensed by them as an auctioneer, according to the provisions of a statute requiring such bonds and security, the court held, that no issue could be joined upon a demurrer to evidence, so long as there was any matter of fact in controversy between the parties.

The demurrer to evidence must state facts, and not merely the evidence conducing to prove them. One party cannot insist upon the other party's joining in demurrer, without distinctly admitting upon the records every fact and every conclusion which the evidence given for his adversary conduces to prove. The court say, in this case, "that it is no part of the object of such proceedings to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony, or the presumptions arising from the evidence; that is the proper province of the jury. The true and proper object

Dormandy v. State Bank of Illinois.

of such a demurrer, is to refer to the court the law arising from the facts. It supposes, therefore, the facts to be admitted, and ascertained, and that nothing remains but for the court to apply the law to those facts. This doctrine is clearly established by authorities, and is expounded in a very able manner by Lord Chief Justice Eyre, in delivering the opinion of all the judges in the case of *Gibson v. Hunter*, before the House of Lords. It was there held, that no party could insist upon the other party's joining in demurrer, without distinctly admitting on the record, every fact and every conclusion which the evidence given for his adversary conduced to prove. If, therefore, parol evidence is given in the case, which is loose and indeterminate, and may be applied with more or less effect to the jury, or evidence of circumstances which is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts of which the evidence is so loose, indeterminate and circumstantial, before the court can compel the other side to join therein. And if there should be such a joinder, without such admission, leaving the facts unsettled and indeterminate, it is a sufficient reason for refusing judgment upon the demurrer, and the judgment, if any, is liable to be reversed for error. Indeed the case made for a demurrer to evidence, is in many respects like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption.

The principal difference between them, is that upon a demurrer to evidence, a court may infer in favor of the party joining in demurrer, every fact of which the evidence might justify an inference; whereas, upon a special verdict, nothing is intended beyond the facts found. Upon an examination of the case at bar, it will be at once perceived that the demurrer to evidence tried by the principles stated, is fatally defective. The defendants have demurred not to facts, but to evidence of facts; not to positive admissions, but to mere circumstances of presumption, introduced on the other side. The plaintiff endeavored to prove by circumstantial evidence, that the defendants granted a license to Marsteller as an auctioneer. The defendants not only did not admit the existence of such a license, but they introduced testimony to disprove the fact; even if the demurrer could be considered as being exclusively taken to the plaintiff's evidence, it ought not to have been allowed without a distinct admission of the facts which that evidence conduced to prove. But when the demurrer was so framed as to let in the defendant's evidence, and thus to rebut what the other aimed

Dormandy v. State Bank of Illinois.

to establish, and to overthrow the presumptions arising therefrom, by counter presumptions, it was the duty of the Circuit Court to overrule the demurrer, as incorrect and untenable in principle.

"The question referred by it to the Circuit Court, was not a question of law but of fact.

"This being the posture of the case, the next consideration is, what is the proper duty of this court sitting in error. It is undoubtedly to reverse the judgment, and award a *venire facias de novo*. We may say, as was said by the judges in *Gibson v. Hunter*, that the demurrer has been so incautiously framed, that there is no manner of certainty in the state of facts upon which any judgment can be founded. Under such a predicament, the settled practice is to award a new trial, upon the ground that the issue between the parties in effect has not been tried."

The case under consideration, and that upon which the preceding opinion was given, are so similar in the character of the demurrer, and kind of proof offered, with the exception that the former does not embrace any evidence on the part of the defendant, that it may well be considered, as to the demurrer, identical with that case; and if that court had anticipated the present case, the reasons and authority upon which its judgment is based, could not have been more opposite. The whole train of reasoning is directly applicable to the case at bar, and decides the question presented by the demurrer. The demurrer is clearly vicious and irregular, and the necessity is felt of insisting upon a rigid conformity to the principles regulating this practice as expounded by the Supreme Court of the Union.

As the case requires to be remanded, and a *venire facias de novo* must be awarded, it is proper to settle the rule in relation to the preliminary proof of loss. The practice of admitting the oath of the party as evidence of loss of the paper, arises from the necessity of the case. The admission of the testimony was not made a question on the trial of the cause, but the manner of receiving the proof seems to have been the question raised. The rule seems to be well settled, that this proof is not evidence in the cause.

It is not to go to the jury, but is addressed to the court for the purpose of establishing the right of the party to the admission of secondary evidence to prove the contents of the paper lost.

The doctrine on this part of the case is ably and minutely reviewed in the case of *Taylor v. Riggs*, by Chief Justice Marshall, and established the rule to be as stated.

The Circuit Court was therefore correct in its decision in requiring the plaintiff to depose in writing to the loss of the notes. No error is

perceived in the rejection of the evidence offered to prove notice of the loss and destruction of the notes. The English practice on this subject has not been introduced into this country ; and a party may recover without a special count on a lost note.

This decision proceeds upon the recognition of the immateriality of notice of the loss, and upon that principle the Circuit Court did not err in the rejection of the proof of notice.

It has been urged, in the argument, that as the Circuit Court compelled the plaintiff to join in the demurrer to the evidence, that this court ought to consider all the facts which the plaintiff's evidence conduced to prove, as established, and render judgment for the amount claimed in this court.

The reasons advanced in support of this position are not considered sound, nor has any adjudged case been produced to support the ground assumed.

It has been already said that the defendants have demurred to evidence of facts, and not to facts themselves, and to presumptions arising from circumstances.

That the duty of the court is, to decide the law arising on these facts, and not to ascertain what the facts are. Should this court undertake to determine, from the evidence, whether that evidence supports, with reasonable certainty, the facts that the notes alleged to have been destroyed, were destroyed, and were the notes for which the plaintiff has sought to recover the value, and what was the contents of them, and whether demand of payment had been made, it would be deciding a question purely of fact, not of law applicable to the facts. This court has no authority to determine matters of fact, nor can it appropriately say what shall be considered as admitted, because the Circuit Court has compelled the plaintiff to join in demurrer.

In the case of *Fowler v. Common Council of Alexandria*, the rule is laid down to be "that if there should be a joinder, without the admission required, leaving the facts unsettled, and indeterminate, it is a sufficient reason for refusing the judgment on the demurrer, and the judgment, if any is rendered, is liable to be reversed for error."

The authority referred to in 2 Tidd's Practice 794, does not support the practice to render judgment for the plaintiff on the merits, in a case like the present. Let the judgment of the Circuit Court of Sangamon county be reversed with costs, the cause remanded, and the Circuit Court directed to award a *venire facias de novo*.

Judgment reversed.

Douglas and Strong, for plaintiff.

S. T. Logan, for defendants.

Gilham v. State Bank of Illinois.

Gilham v. State Bank of Illinois.

GILHAM v. STATE BANK OF ILLINOIS.

2 SCAM. R., 245-248.

*Error to Municipal Court of Alton.**Demurrer to Evidence.*

1. WHERE a note is indorsed in blank, a holder can recover upon it without any other proof than his possession.

2. Where there are two blank indorsees upon a note, upon a demurrer to evidence in an action upon the instrument, the court will intend a joint indorsement.

*Judgment affirmed.**Strong, for plaintiff.**Cowles, Krum, and Scammon, for defendants.*

GILHAM v. STATE BANK OF ILLINOIS.

2 SCAM. R., 248-250.

Error to Municipal Court of the City of Alton.

1. WHERE a private charter of incorporation is declared to be, and recognized afterward by the legislature, as a public act, its corporate capacity cannot be questioned when they sue.

2. But even if the corporation is bound to prove its existence, a demurrer to evidence does not impose that burden upon it.

3. The rules of law regulating trials in judicial tribunals are designed to *facilitate* and promote *justice*. They were not prescribed "as traps to insnare the unwary, or to defeat the substantial ends of justice."

4. Trickery and chicanery, and all attempts to lull an adversary into security, so as to obtain technical advantages over him, are most solemnly denounced by the Supreme Court.

5. An objection which might have been taken and obviated in an inferior court, will not be regarded by the appellate court.

6. An inadvertence or oversight of the plaintiff apparent upon the face of the record will not avail a demurrant to evidence, where his adversary has the right on his side.

7. Upon a demurrer to evidence where there are two blank indorsements upon the note sued upon, the court will intend that the indorsement was joint.

8. If the damages are erroneously assessed in an action on a note, the remedy is by motion for a new trial.

Gillham v. State Bank of Illinois.

Coleman v. Henderson.

9. If the declaration is insufficient or defective, a demurrer to evidence is not the mode of reaching the error.

Judgment affirmed.

Davis, Jones, and Strong, for plaintiff.

Cowles, Krum, and Scammon, for defendants.

COLEMAN v. HENDERSON.

2 Scam. R., 251-253.

Appeal from Fulton.

An old fashioned action of ejectment, Doe v. Roe.

1. In *fictitious* actions, such as ejectment under the common law rules of procedure, the death of one or all of the lessors of the plaintiff, is no ground for the abatement of the action.
2. Where, under the old rules, an ejectment is commenced on the demise of a deceased lessor, the proper mode of reaching the defect, is to apply to the inferior court, by motion based upon affidavit, to strike the name of the deceased lessor from the declaration and record.
3. A general verdict in ejectment is proper at common law, although the proof is that the defendant is in possession of only a part of the premises declared for. The plaintiff takes and executes his writ of *habere facias possessionem* at his peril.
4. A judgment in ejectment is for the recovery of the *possession*, without prejudice to the *right of title*.
5. If the party plaintiff takes possession of more than his right of possession justifies, he does so at his peril, and the court from whence the writ of *ha. fa. pos.* is awarded, will, upon a summary application, in the form of a motion, inquire into the facts, and award a writ of restitution.

LOCKWOOD, J.—This was an action of *ejectment* commenced by the plaintiff, on demises from William Henderson and several others, against Coleman for the recovery of the northwest quarter of section 26, in T. 7 N., of R. 4 E. of the fourth principal meridian, containing one hundred and sixty acres of land. The defendant pleaded not guilty. On the trial of the cause, the lessors of the plaintiff read in evidence, to the jury, a patent from the United States to William Henderson, for the lot in question, and proved that Coleman, at the time of the commencement of the suit, was in possession of seventy-three acres of said land off the north part.

It is unnecessary to state what is contained in the bill of exceptions in relation to evidence overruled, instructions asked and refused, and exceptions to instructions given, as they only relate to two points, that is, in relation to the death of Henderson, one of the lessors of the plaintiff, and to the point whether, on proof that the defendant was in possession of only seventy-three acres, the plaintiff was entitled to recover at all, and if so, whether the verdict must not be restricted to the land actually proved to be in possession of the defendant below.

On the first point, we are of opinion that all testimony in relation to the death of Henderson, or whether such a person ever existed, was

Coleman v. Henderson.

irrelevant. The plaintiff in the action is John Doe, and the death of one or more, or all of the lessors of the plaintiff after the commencement of the suit, would not abate the action.

This principle settles the question, that all proof on the trial, relation to the death of Henderson, was irrelevant, and correct overruled. Should an action of ejectment be commenced on a demise from a deceased person, the proper course would be to apply to the court below, on affidavit, to strike from the declaration such demise.

The other point made in this case is without merit. The verdict, although a general one, could only affect the defendant below to the extent of his possession. The effect of a recovery in ejectment is correctly stated by Lord Mansfield, in the case of *Ulyss v. Horde*. A judgment in ejectment, says that learned judge, "is a recovery of the possession (not of the seisin or freehold) without prejudice to the right, as it may afterward appear, that was between the parties. He who enters under it, in truth and substance, can only be possessed according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession comes according to right. If he has no title, he is in as a trespasser; and, without any entry of the true owner, is liable to account for the profits."

This is the obvious and established construction of the nature and effect of a judgment in the action of ejectment. Hence no person would be injured by the general verdict of the jury, although it might enable the party to take possession of the whole of the tract mentioned in the declaration. So far as Coleman was concerned, the evidence of the plaintiff below covered the whole tract, and he had the same right to recover the whole tract, as he had a part.

Should a party, however, under his writ of *habere facias possessionem*, take possession of more land than was recovered by the verdict; or should he attempt to disturb the possession of a person not a party to the suit, the court would, in a summary manner, inquire into the facts, and award a writ of restitution. These principles in relation to the action of ejectment, are amply sufficient to protect all parties from any injurious effects resulting from a general verdict, or a verdict not definitely settling the extent and description of the land recovered.

Judgment affirmed.

S. T. Logan, for appellant.

Cyrus Walker, for appellee.

Weatherford v. Wilson.

Shephard v. Ogden.

WEATHERFORD v. WILSON.

2 Scam. R., 254-257.

Appeal from Montgomery.

1. WHERE there are several pleas in bar to an action, which apply to the whole declaration, and a demurrer is interposed to each plea, and the demurrer is sustained to a portion of the pleas, but the record is silent as to the disposition of the demurrer to the remaining pleas, and the court proceed to try issues of fact upon other pleas, the judgment will be reversed and the cause remanded.

2. The judge of the Circuit Court is not bound to take minutes of the testimony.

3. It is the duty of an excepting party to prepare his bill of exceptions, submit it to his adversary, and if they cannot agree as to the facts and exceptions, the judge must settle the bill according to his recollection.

4. If a party moves for a new trial and is overruled, and the judge refuses to sign and seal a true bill of exceptions, the remedy of the injured party is by *mandamus*.

5. The refusal of the judge to prepare a bill of exceptions cannot be assigned for error.

*Judgment affirmed.**Logan and Smith, for appellant.**Walker, Linder and Greathouse, for appellee.*

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SHEPHARD v. OGDEN.

2 Scam. R., 257-260.

Error to the Municipal Court of Chicago.

1. WHERE process is sent to a foreign county for service the declaration must aver the existence of the facts required by law to give the court jurisdiction to issue the writ.

2. An affidavit setting forth the jurisdictional facts is insufficient.

3. A general statement under a *videlicet* that the defendant, at a particular time and place, was indebted to the plaintiff for money paid, etc., is not an averment that the cause of action accrued within the jurisdiction of the court.

4. The cause of action accrues to a surety against the principal debtor when the former pays the debt of the latter.

5. Where the defendant moves to quash an original process for

Shephard v. Ogden.

Berry v. Savage.

Vance v. Funk.

want of jurisdiction in the court issuing it, and thereupon the plaintiff asks and obtains leave to amend his declaration by inserting the requisite jurisdictional facts, this is virtually an overruling of the motion.

6. A defendant is not bound to plead a dilatory plea until the declaration is filed.

Judgment reversed.

Osgood, for plaintiff.

Scammon, for defendant.

BERRY v. SAVAGE.

2 SCAM. R., 261-262.

Error to Morgan.

1. A PLAINTIFF has a right to submit to a nonsuit at any time before the cause is fully heard by the jury. Thus, if, after the evidence has been heard and the jury have retired from the bar, the jury return into court for instructions—the plaintiff may submit to a nonsuit.

2. Where a declaration upon a promissory note alleges that it was payable in the year 1830, and the note produced in evidence was payable in the year “one thousand *eighteen* hundred and thirty”—*held*, a fatal variance. (a)

3. Where the Circuit Court improperly refuse to permit the^d plaintiff to become *nonsuited*, the Supreme Court will render the proper judgment without remanding the cause.

Judgment reversed and nonsuit rendered.

W. Thomas, for plaintiff.

E. D. Baker, for defendants.

(a) S. C. in equity, where relief was granted: 2 SCAM. R., 545.

VANCE v. FUNK.

2 SCAM. R., 263-264.

Appeal from the Municipal Court of Chicago.

1. THE Municipal Court of Chicago, although an “inferior court” within the meaning of the constitution, and limited in jurisdiction territorially, is, notwithstanding, to be regarded as a court of general jurisdiction according to the principles of the common law.

2. In courts of record of general common law jurisdiction, their authority to hear and determine a cause is presumed.

3. Where a court has jurisdiction of the subject matter of an action,

Vance v. Funk.

Bacon v. Wood.

Nixon v. People.

the appearance and plea of the defendants is an admission of jurisdiction over their persons.

4. Where the service of original process is defective, an appearance and plea in bar is a waiver of the irregularity.

5. A statement in a note that it is "sealed" does not make the writing a deed unless a *seal* is attached to the signature of the parties.

6. A misnomer must be pleaded in abatement and cannot be reached by way of variance upon a trial.

7. Where an action is brought upon a note, the execution of it can only be put in issue by a plea, verified by the affidavit of the defendant.

8. An admission is sufficient to charge a joint defendant as a co-partner.

Judgment affirmed.

Peyton, for appellants.

Spring and *Scammon*, for appellees.



BACON v. WOOD.

2 Scam. R., 265-267.

Error to Macoupon.

1. A clock peddler or dealer in clocks is one whose sole business it is to vend and exchange clocks.

2. Proof that a person sold at one time two clocks is not evidence that he is a peddler of clocks.

3. Penal statutes are to be construed *strictly*.

Judgment reversed.

Fisk, for plaintiff.

Logan, for defendant.



NIXON v. PEOPLE.

2 Scam. R., 267-269.

Error to White.

1. Throwing a cripple out of a wagon, and leaving him to take care of himself during inclement weather, with intent to kill him, is an assault with intent to commit murder. (a)

2. Precedent of the indictment.

The defendant was tried and convicted upon this indictment:

"State of Illinois, Wayne County, ss.

"The grand jurors chosen, selected, and sworn, in and for the county of Wayne, in the name, and by the authority of the people of the

State of Illinois, upon their oaths present, that Absalom Nixon, late of the county aforesaid, laborer, on the twenty-third day of October, in the year of our Lord one thousand eight hundred and thirty-eight, with force and arms, at and in the county aforesaid, in and upon one Adam, a man of color, then and there being a deformed person, and by reason of his being such deformed person, being unable to walk or otherwise to move himself from place to place, and also then and there being deficient in voice, so as to be unable to call aloud, and in the peace of God, and of the people of the State of Illinois, then and there also being, unlawfully did made an assault, and then and there forced and threw the said Adam from a certain wagon, in which he, the said Adam, then and there was, to and upon the ground, the said ground then and there being frozen and very cold, and then and there did force and compel the said Adam (so being such deformed person as aforesaid, and also by reason of his being such deformed person, being unable to move himself from place to place as aforesaid, and also being deficient in voice, so as to be unable to call aloud as aforesaid), then and there to lie upon the ground, so being frozen and very cold as aforesaid, and then and there did abandon and leave him, the said Adam, lying on the ground as aforesaid, to the great pain and torture of the said Adam, and to the great damage and impoverishment of his health and strength of body, with intent him the said Adam by the means aforesaid, then and there there feloniously, willfully, and of his malice aforethought, to kill and murder, and other wrongs to him, the said Adam, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Illinois.

“G. B. SHELLEDY, *State Attorney.*”

And sentenced to imprisonment in the penitentiary for seven years.

BROWNE, J.—This indictment was brought under a statute of this State, which provides that an assault with an intent to commit murder, shall subject the offender to confinement in the penitentiary for a term not less than one year, nor more than fourteen years. The indictment charges the aforesaid Absalom Nixon with an assault with the intent to commit murder on one Adam, a man of color, by forcing and throwing the aforesaid Adam from a certain wagon, in which he, the said Adam, then and there was, to, and upon the ground, the said ground then and there being frozen and very cold; and then and there did force and compel the said Adam, then and there, to lie upon the ground so being frozen, and then and there did, to the great damage of him, the said Adam, cold as aforesaid, did abandon and

Nixon v. People.

Beaubien v. Brinckerhoff.

leave him, the said Adam, lying on the ground, etc., with intent him, the said Adam, by the means aforesaid, then and there feloniously, willfully, and of his malice aforethought, to kill and murder, etc. It is stated in the indictment, that the said Adam is a deformed person, and unable to walk or otherwise to move himself from place to place, and so deficient in his voice as to be unable to call aloud. This indictment has every ingredient necessary to constitute a good one, under this statute. The offence is well set out. There may be a thousand forms of death, by which human nature may be overcome—by poisoning, starving, drowning, etc. This differs from most cases of assault with intent to commit murder; it is more malignant, and discovers more depravity. But if one assault with intent to commit murder differs from another, it makes it no less a crime. This one seems to be of a very atrocious character.

Conviction affirmed.

(a) Cases of assault with intent to murder: *Curtis v. People*, Bre. R., 199; *Same v. Same*, 1 Scam. R., 288; *Perry v. People*, 14 Ill. R., 497.

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BEAUBIEN v. BRINCKERHOFF.

2 Scam. R., 269-275.

Error to Municipal Court of Chicago.

1. The Circuit Court of Illinois is a superior court of general jurisdiction, and not an "inferior court" in the common law sense of the term.
2. Their jurisdiction is original and unlimited, except in special cases.
3. Their power under the constitution and statutes is equal to that of the courts of "King's Bench" and "Common Pleas," in England.
4. Every presumption will be indulged in to sustain the jurisdiction of a Circuit Court.
5. The Municipal Court of Chicago has concurrent jurisdiction in the county of Cook, with the Circuit Court of that county.
6. The same intendments will be indulged in by the Supreme Court to maintain the judgment of the Municipal Court, that are usually resorted to in affirmance of the authority of the Circuit Court.
7. The Circuit Court cannot direct to, and cause its process to be served in, a foreign county, unless the facts exist which the statute prescribes as "*jurisdictional facts*."
8. If the High Constable of the Municipal Court of Chicago serves an original process upon a defendant within his *bailiwick*, the Supreme Court, upon writ of error, will presume the jurisdiction of the court over the person of the defendant, where no plea to the jurisdiction is interposed.

LOCKWOOD, J.—This was an action of *assumpsit* commenced by Brinckerhoff, as an indorsee of a promissory note, against Beaubien, the maker. The declaration is in the usual form, stating the note to be made, "to wit," at Chicago, in the county of Cook, but contains no averment that the plaintiff and defendant, or that the defendant resided, at the time of commencing the suit, in the city of Chicago, or in the county of Cook.

The summons was directed to the high constable of the city, and by

him returned, served on the defendant. Judgment was given in favor of the plaintiff by default.

The assignment of errors questions the jurisdiction of the Municipal Court.

The Municipal Court of the city of Chicago was created, and its jurisdiction conferred, by the 69th section of the act entitled, "*An Act to incorporate the City of Chicago*," which declares that "there shall be established in the said city of Chicago, a Municipal Court, which shall have jurisdiction concurrent with the Circuit Courts of this State in all matters, civil or criminal, arising within the limits of the said city, and in all cases where either plaintiff and defendants, or defendants, shall reside, at the time of the commencing suit, within said city; which court shall be held within the limits of said city, in a building provided by the corporation."

The jurisdiction of this court was increased by the 78th section of the same act, which declares "that said Municipal Court shall be a court of record, and have a seal, to be furnished by the Common Council; the process of said court shall be tested by the judge, and issued in the same manner as in the Circuit Courts, and shall be directed to the high constable of said city, to be executed within the limits of the same; but when the defendant, or defendants, or either of them, may reside without the limits of the said city, and in Cook county, the process shall be directed to the sheriff of said county, who shall execute the same, and make return thereof to the clerk of said court."

By the 80th section, "all judgments rendered in said Municipal Court shall have the same lien on real and personal estate, and shall be enforced in the same manner as judgments rendered in the Circuit Courts of this State." The jurisdiction of this court was also enlarged by the "*Act supplemental to an act to incorporate the City of Chicago*," by which last mentioned act, "all persons residing in the county of Cook may, at their option, have recourse to the Municipal Court of said city, and the said Municipal Court shall have concurrent jurisdiction with the Circuit Court, in all matters arising within said county."

At common law, courts are divided into superior and inferior courts, or courts of record, and those not of record.

A material distinction prevails between these two classes of courts, in relation to the mode of stating their jurisdiction. In relation to superior courts, or courts of record, the law is that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and on the contrary, nothing shall

be intended to be within the jurisdiction of an inferior court, but that which is expressly alleged.

The act creating the Municipal Court of the city of Chicago, and the act supplemental thereto, confer on the Municipal Court concurrent jurisdiction with the Circuit Courts in all matters arising within the county of Cook.

To what class of courts, then, do the Circuit Courts of this State belong?

The Circuit Courts are the only superior courts in the State that possess original and unlimited jurisdiction. They exercise, within their respective counties, all the powers and jurisdiction of the courts of King's Bench and Common Pleas in England; and although these courts are inferior to the Supreme Court, because appeals and writs of error lie from their decisions to the Supreme Court, yet this circumstance does not constitute them inferior courts in the common law sense of the term. Courts not of record are denominated inferior courts, because, if their proceedings are questioned in the superior courts, they must specially show that they acted within their jurisdiction. The Circuit Courts are preëminently the superior courts of this State; and as the Municipal Court of the city of Chicago possesses concurrent jurisdiction within the city of Chicago and the county of Cook with the Circuit Court, it must be considered a superior court. Now, for anything that appears in the declaration at bar, the Municipal Court may have had jurisdiction. The note may have been executed in Chicago, which would have given jurisdiction.

The plaintiff and defendant may also have resided in Chicago or in the county of Cook.

In one of these ways the Municipal Court may rightly have had jurisdiction, both of the person and of the cause of action; and as it does not appear from the declaration, but that some one of the facts existed which would have given the Municipal Court jurisdiction, this court, upon the rule above laid down, is bound to intend that the Municipal Court had jurisdiction, both of the person and the subject matter of the action.

The case of *Key v. Collins*, decided at December term, 1837, was relied on in the argument by the plaintiff in error as an authority. In that case the Morgan Circuit Court had issued its process to another county, where it was served, and judgment was rendered in said court by default.

The only point decided in that case was, that the Circuit Courts of the several counties are limited territorially, and that whenever a Circuit Court issued process beyond the limits of the county in which

Beaubien v. Brinckerhoff. Hamilton v. Blair. Beaubien v. Holmes. Creach v. Taylor.

the court sits, it must show its jurisdiction. The doctrine of that case is, that while exercising its jurisdiction within the boundaries of the county where it is held, it is a superior court, and its jurisdiction is presumed; but if it extends its jurisdiction extra-territorially, its jurisdiction must appear.

That case does not, therefore, conflict with this decision, as it is not pretended that the Municipal Court awarded its process beyond its territorial limits.

Judgment affirmed.

Peyton, for plaintiff.

Butterfield and *Collins*, for defendant.



HAMILTON v. BLAIR.

2 SCAM. R., 276.

Error to Municipal Court of Chicago.

SAME points decided as in the preceding case.

Judgment affirmed.

Grant, for plaintiff.

Judd, for defendant.



BEAUBIEN v. HOLMES.

2 SCAM. R., 276.

Error to Municipal Court of Chicago.

SAME points decided as in the two preceding cases.

Judgment affirmed.

Peyton, for plaintiffs.

Butterfield, for defendants.



CREACH v. TAYLOR.

2 SCAM. R., 277.

Appeal from Calhoun.

WHERE there is a demurrer to evidence, and a joinder thereto, both should be in writing and appear upon the files of the court. A simple entry upon the record, "*Demurrer to evidence and joinder*" is too loose a practice to be tolerated. (a)

Judgment reversed.

J. W. Whitney, for appellant.

(a) *Vide* as to demurrers to evidence: *Dormandy v. State Bank*, 2 SCAM. R., 244; *Gillham v. State Bank* 2 *Ibid.*, 250.

Robinson v. Burkell.

Hubbard v. Harris.

Brewster v. Scarborough.

ROBINSON v. BURKELL.

2 Scam. R., 278.

Appeal from the Municipal Court of Chicago.

1. A PLEA of *puis darrien continuance* may be filed at any time before trial. (a)

2. A plea of *puis darrien continuance* need not be verified by affidavit.

3. If the Circuit Court refuse to permit a valid plea of *puis darrien continuance* to be filed before trial, the judgment will be reversed, and a *venire de novo* awarded.

*Judgment reversed.**Morris and Scammon, for appellant.**Spring and Goodrich, for appellee.*

(a) Cases in Illinois as to pleas of *puis darrien continuance*: Coles v. Madison County, Breese R., 116; Ross v. Nesbit, 2 Gilm. R., 252; Kenyon v. Sutherland, 8 Ibid., 104.

Distinction between a plea *puis darrien continuance*, and a plea to the further maintenance of the action: Kenyon v. Sutherland, 3 Gilm. R., 104.

HUBBARD v. HARRIS.

2 Scam. R., 279.

Appeal from Municipal Court of Chicago.

SAME points decided in Beaubien v. Brinckerhoff, ante, p. 571.

*Judgment affirmed.**Grant and Peyton, for appellants.**Spring, for appellee.*

BREWSTER v. SCARBOROUGH.

2 Scam. R., 280-283.

Error to Cook.

1. The Circuit Courts of Illinois are tribunals of general, original, and exclusive jurisdiction, except in certain specified cases named in the constitution and laws.
2. The Circuit Courts have jurisdiction in all transitory actions where the defendant is found within the territorial jurisdiction of the respective courts.

THE decision is based upon this plea:

“And the said defendant, Frederick Scarborough, in his own proper person, comes and says, that this court ought not to have or take further cognizance of the action aforesaid, because he says, that the supposed causes of action, and each and every of them (if any such have accrued to the said plaintiffs) accrued to the said plaintiffs out of the

jurisdiction of this court, that is to say, in the county of Vermilion, where the above named defendant resided at the time the cause of action accrued, and not at Chicago, in the county of Cook, or elsewhere, within the jurisdiction of this court, and this the said defendant is ready to verify, wherefore he prays judgment whether the court can or will take further cognizance of the action aforesaid."

The residue of the facts sufficiently appear in the opinion delivered by

SMITH, J.—This was an action of *assumpsit* brought on a bill of exchange, made in the city of New York, and accepted by the defendants, payable in the State of Indiana, and declared on as such. One of the defendants was arrested on a *capias ad respondendum*, issued out of the Circuit Court of the county of Cook. The other defendant was not found. There is but one count in the declaration, and that is on the acceptance of the bill, by the defendants, payable in the State of Indiana. The defendant on whom the process was served, pleaded in abatement to the jurisdiction of the court; and that is the single point presented for consideration.

It is assumed in support of the plea, which the Circuit Court of Cook county sustained, on a demurrer to it, that the Circuit Court had no jurisdiction whatever over the cause of action; because the cause of action did not arise in the county of Cook, and that the jurisdiction of the court is, in such cases, bound by its territorial limits; and although the defendant was within its acknowledged territorial jurisdiction, still it is urged that the Circuit Court had no jurisdiction over the subject matter of the cause of action.

To determine this question, which reaches, it would seem, to all transitory actions, which may be brought in the Circuit Courts of the State, and which therefore involves a question of vast magnitude, in reference to cases antecedently had, as well as those to be prosecuted hereafter, it will be necessary to consider the jurisdiction conferred on the Circuit Courts by statute; and the exposition that has been given to their jurisdiction, under the laws conferring their jurisdiction, and the practice had in reference thereto. From the 31st of March, 1819, to the act of the 23d January, 1829, the jurisdiction conferred by statute has been uniformly the same; and is contained in the following language: "and the said Circuit Courts shall be holden at the respective court-houses of said counties, and the said justices respectively, in their respective circuits, shall have jurisdiction over all causes, matters, and things, at common law, and in chancery, arising in each of the counties in their respective circuits,

where the debt or demand shall exceed the sum of twenty dollars."

It is insisted, that inasmuch as the cause of action did not, in a technical sense, originate in the county of Cook, it not being the place where the contract arose, or was created, that therefore it cannot be said to be a case of contract arising within the jurisdiction of the court; and that consequently, it has not jurisdiction of the cause. If this be true, then the Circuit Courts of the State are ousted of all jurisdiction whatever in personal actions, where the cause does not so arise, although they are transitory in their character.

It is conceded that the ordinary signification of the language used, would import that the jurisdiction is confined, in civil cases, to causes of action originating in the county where the court sits. Yet this surely could not have been the intention of the legislature; because of the clear and manifest injustice such a construction must inevitably produce.

It would cut off all remedy for the collection of debts created elsewhere than in the county of the residence of the person contracting; and wholly exempt those who contracted out of the State, from being amenable to the process of our courts. A moment's consideration will show, that a construction which involves such consequences ought not to be imputed to the legislative department. It would at once directly conflict with the 12th section of the 8th article of the Constitution of this State, which declares, "that every person within the State ought to find a certain remedy in the laws, for all injuries or wrongs which he may receive in his person, property, or character." It must, therefore, receive such a reasonable interpretation, as will best conduce to the attainment of the object the legislature had in view, without doing violence to the language used, and the objects contemplated. We are justified in the assertion, that the framers of the law intended to convey a jurisdiction, in civil cases, over all transitory actions, where the party comes within the territorial limits of its jurisdiction, considering that the cause of action would arise wherever the person of the party was found. This construction is reconcilable with the intent and object in view, at the passage of the acts creating the jurisdiction; and is conformable to the universal practice which has obtained in the Circuit Courts ever since their creation. This construction is moreover directly fortified by a provision in the first section of an act concerning practice in the courts of law in this State, which declares, "that it shall not be lawful for any plaintiff to sue a defendant out of the county where the latter resides, or may be found, except in cases where the debt,

Brewster v. Scarborough.

Wincher v. Shrewsbury.

contract, or cause of action accrued in the county of the plaintiff, or where the contract may have been specifically made payable."

The object of this act was to restrain a previous practice, which had obtained, of sending process from one county to another, to bring the defendant into a county where he did not reside, and was productive of much oppression.

But we find in the words, "or may be found," a direct recognition of the right to arrest or serve a party with process, issuing out of the Circuit Court of any county, into which the party shall come and may be found. It is a clear recognition of the right to prosecute a party, on a cause of action transitory in its nature, in the Circuit Courts of any county whenever that party may be found within its territorial jurisdiction.

Every argument which supports this construction is in favor of common right; all others that oppose it, appear to have their origin in injustice and error.

The Circuit Courts are courts of general original jurisdiction, and are exclusively vested with jurisdiction, in civil cases, except those of justices of the peace, whose jurisdiction is limited to sums of \$100. If they have not jurisdiction, then, in all cases exceeding that sum, there is no remedy.

Such a condition of the law cannot be for a moment supposed; and the extraordinary results which would flow from such a state of the law, sufficiently admonishes us of the dangers which would arise from sustaining the judgment in this case.

Judgment reversed.

Grant and Peyton, for plaintiffs.

Davis and Forman, for defendant.

WINCHER v. SHREWSBURY.

2 Scam. R., 283-285.

Error to Morgan.

1. Torts are not assignable.

2. Torts committed prior to an alienation of land do not pass from vendor to vendee.

3. Where a squatter upon the public lands cuts down trees standing and growing upon such land, and manufactures therefrom timber, lumber, or rails, and after the trespass is committed, a third person purchases the land from the government, the latter cannot maintain an action of trespass against the squatter to recover the value of the rails or timber thus manufactured out of the trees aforesaid, and carried away by the trespasser after the entry.

THE facts were agreed (in *trespass*) thus:

"The plaintiff went upon a tract of land which belonged to the government of the United States, and made ten hundred and sixty

rails, and cut and sawed timber. All of said rails and timber were of the value of fifteen dollars, and were made of timber trees situated upon said land. Said rails were laid in piles through the woods, on the land aforesaid, and the sawed timber lying on the land, and in that situation were of the value aforesaid. While the timber was thus situated on said land, the defendant entered and purchased the land of the United States, and paid for it, but had no patent for said land, but a certificate of purchase from the United States. Said defendant prohibited the plaintiff from taking this timber off of his, defendant's, land, and went and hauled the rails and timber away, and converted them to his own use, without the consent of the plaintiff. To recover the value of said rails and timber, this suit was brought.

"November 5th, 1839.

"SAMUEL WINCHER,

"MICHAEL SHREWSBURY."

WILSON, C. J.—The facts of this case are, that the plaintiff below had made, from timber growing on government land, a quantity of rails, and left them piled up upon the land. The defendant afterward entered the land and took the rails, for which the plaintiff brought this action. I have no doubt of the plaintiff's right of recovery against the defendant. It is true, that the wrongful taking or conversion of the property of another, does not give the trespasser a title, as against the owner, who may follow and recover it as long as it can be identified. But this rule applies only to the owner of the property taken, and not to a stranger.

Had the defendant any title to the rails in question, and how did he acquire it? At the time the trespass was committed by the plaintiff, the land, and consequently the timber growing on it, of which the rails were made, belonged to the government. The cutting of the timber was therefore an injury and trespass against the government; and it had a legal remedy. Therefore the defendant had neither a right of property, nor a right of action, at the time of the plaintiff's trespass, in making the rails. To what then did he acquire title, by a subsequent purchase of the land? Certainly not to a right of action for a previous trespass; nor to the timber which had been previously severed from the land, converted into rails, farming utensils, furniture, or anything else. A certificate of purchase or patent vests in the patentee a title to the land, and generally all that is growing on, or is in the contemplation of law attached to the land—as houses, fences, growing timber, grain, etc.; and it is said that fallen timber passes with the land. But that which has been severed from the land, and, by the art and labor of man, converted into personal property, such

Wincher v. Shrewsbury.

Dunseth v. Wade.

as implements of husbandry, barrels, furniture, or even rails when not put into a fence, or evidently intended to be so used upon the land (which could not be inferred if made by a stranger), do not pass with it, any more than the grain, grass, or fruit which has grown upon, and been gathered from it. In another view of this case, the defendant's liability would seem clear.

The government being the owner of the land, at the time of the trespass by cutting timber, it might, and if not barred by time, may yet recover, in trespass, for the injury done to the land, or, by action of trover, recover the value of the rails, which would certainly be a bar to the defendant's recovery for the same trespass. For if the defendant may convert the rails to his own use, he may recover of the plaintiff for a conversion by him, and thus subject him to make compensation twice for the same trespass.

This would be both unjust and illegal. The vendor and vendee of the land cannot both have a remedy for the same trespass; a recovery by one would be a bar to that of the other. A recovery by the government in an action of trover, against the plaintiff below, for the value of the rails made on its land, would vest the right to them in him; and although it does not appear that any such prosecution has been instituted by the government, yet the right to do so proves the defendant's want of title, either to recover for the trespass on the land, or to take the rails which are the fruits of it.

Judgment affirmed.

Logan, for plaintiff.

McConnel, for defendant.

DUNSETH v. WADE.

2 SCAM. R., 285-289.

Error to Peoria.

1. The owners of a steam vessel navigating the western rivers, are common carriers of goods intrusted to their charge.
2. Where goods were shipped upon a steamboat at Cincinnati, Ohio, to be delivered at Peoria, Illinois, "*with privilege of reshipping on any good boat*," the obligation of the carrier is not discharged unless the goods are delivered in good order to the consignee, although the carrier has availed himself of the privilege of reshipment upon another boat.
3. Hearsay evidence is *inadmissible*.
4. Where a jury is waived, and the cause tried by the court, and illegal evidence is heard, the Supreme Court will intend that such improper evidence was not regarded by the court.

LOCKWOOD, J.—This was an action of *assumpsit* commenced by Wade, Lowry, and Hills, against Dunseth, for failing to deliver to the plaintiffs below, at Peoria, certain goods belonging to them, which were shipped on board Dunseth's steamboat, called the Indian, then

Dunseth v. Wade.

lying at Cincinnati. The defendant pleaded *non-assumpsit*. The cause was tried, by consent of the parties, without a jury.

The bill of exceptions contains the following facts. A witness, on the part of the plaintiffs below, testified that he, as agent of Wade, Lowry and Hills, received the bill of lading hereinafter copied, from the merchants in Cincinnati, who had shipped the goods on board the steamboat of Dunseth, at Cincinnati; that the goods belonged to the plaintiffs below, and never arrived at Peoria. That witness, at a subsequent time, had a conversation with Dunseth, in which he admitted that he had received the goods mentioned in the bill of lading, but said that he did not consider himself liable for the loss or damage of the goods, because, by the terms of the bill of lading, he was entitled to the privilege of reshipping said goods on any good boat; that he had reshipped said goods on the steamboat America, and that the loss happened while the goods were on the said boat America. The witness also testified that the goods lost were of the value of \$194 75.

The defendant below having proved the execution of the bill of lading, which was produced on the trial, from the possession of the plaintiffs below, read the same as follows :

" 33 ps. bar Iron, . . .	1,030
2 bars $\frac{5}{16}$ Bd. & Sq. . .	102
" " in hoop, . . .	82
1 " 8d Nail Iron, . .	83
1 " $\frac{5}{8}$ Round, . . .	52
1 " $\frac{1}{2}$ do. . . .	48
1 " $\frac{3}{8}$ do. . . .	68
20 kegs Lead, . . .	500
90 ps. Castings, . . .	1,495

3,460

LOWRY, WADE & Co.,
Peoria.

With privilege of reship-
ping on any good boat.

" Shipped in good order, and well conditioned, by Balbridge & Co., on board the good steamboat called the Indian, whereof is master for the present voyage, Dunseth, now lying in Ohio River; to say,

Sundries per margin ;

One bar of Iron in dispute, being marked and numbered as in the margin, and are to be delivered in like good order and condition, (the unavoidable accidents of the river only excepted), at the port of Peoria, unto Lowry, Wade & Co., or assigns, he or they paying freight for the said goods, at the rate of one dollar per hundred. In witness whereof, the master or clerk of said steamboat, hath affirmed to three bills of lading all of this tenor and date, one of which being accomplished, the others to stand void. Dated at Cincinnati, the 13th day of July, 1836. " S. DUNSETH."

It was also proved by the defendant below, that S. Dunseth, whose signature appears to the foregoing bill of lading, was clerk of the steamboat Indian at the time the above goods were received on said boat, and at the time of the execution of the bill of lading. The defendant below also proved that the steamboat American was a good boat at the time of the reshipment, and that she (the American) was sunk on her way to Peoria, in the Illinois River, with the plaintiffs' goods on board, by the steamboat Friendship running into her (the American), as witness understood, though he had no personal knowledge; and that the pilot of the American, at the time of this accident, was a good pilot, and that the sinking of the American was an accident, as he had heard say, and not occasioned by the negligence of her officers, or the mismanagement of the boat American, as he had also heard said. It was also said that the boat American was afterward raised, and most of her loading was saved; and he did not know but all the plaintiffs' goods were saved.

Upon this evidence the court below rendered a judgment for the plaintiffs below. The assignment of errors questions the correctness of the decision. 'This is a case of first impression in this court. We have searched for authorities as to the effect of the privilege reserved in the margin of the bill of lading without success.

The authorities referred to in the brief of the plaintiff in error have no application to the question arising in this case. In the absence of adjudged cases, within the reach of the court, we must apply general principles to the facts of the case.

In order to arrive at a just conclusion, it is necessary first to determine the extent of the obligation incurred by the master of the Indian, when he undertook to transport the goods of Wade, Lowry & Co., from Cincinnati to Peoria. The language of the bill of lading is, that the goods were to be delivered at Peoria to Wade, Lowry & Co., they paying the freight for the goods at \$1 per hundred, the unavoidable accidents of the river only excepted. This contract bound Dunseth, the master of the boat, to deliver from the boat Indian the goods in question, unless prevented by the unavoidable accidents of the river. What change in the terms of this contract did the words "with privilege of reshipping on any good boat," written in the margin of the bill of lading, produce? Was the master discharged from all obligation in relation to the carriage and delivery of the goods at Peoria, by merely reshipping the goods on board "any good boat?" Clearly not. He was to receive freight on the delivery of the goods at Peoria, for transporting the goods the whole distance. His obligations were consequently coextensive with the reward he was to receive.

He could not charge freight *pro rata* for the distance he carried the goods, and then leave the owner to be charged for the remainder of the distance such prices for freight as the conscience of the master of the boat on which the goods might be reshipped should see fit to demand.

The master having undertaken, for a stipulated reward, to deliver the goods, in good order, in Peoria, was bound to do so unless he could show that the goods were lost, or so injured as to prevent their delivery, by the unavoidable accidents of the river. The *onus* lay on him whether he reshipped the goods or not. This proof he undertook to give; but the whole of his evidence of the loss of the goods by unavoidable accident was hearsay.

Doubtless had this evidence been offered to a jury it would have been objected to and rejected; but as the court tried the cause, the whole of the evidence was heard, and that portion disregarded by the judge, which he considered as improper.

Had the cause been tried before a jury, it would have been proper for the plaintiffs below to have moved the court to instruct the jury to disregard the hearsay testimony; but where the judge tries the case no such motion is necessary, because it is the duty of the court to decide the case upon the legal evidence before it.

The legal testimony in the case was the shipment of the goods of the plaintiff below, on board of the steamboat Indian, under a contract to deliver them at Peoria; that the goods had never been delivered, and that the goods were worth \$194 75.

From the loose manner in which the bill of exceptions is drawn it is doubtful whether the witness of the defendant below intended to say that he knew that the goods were reshipped on board the American, or whether he meant only to state that, at the time he heard the goods were reshipped, the American was a good boat. Whatever may be the true understanding of this part of the testimony, there is no doubt that all the witness said in relation to the sinking of the American, by being run into by the steamboat Friendship, is entirely hearsay, as well as the testimony that the accident was not occasioned by the negligence of the officers of the American.

The court below was consequently justified in disregarding the hearsay testimony, and in giving judgment for the plaintiffs below on the evidence. Should it be inquired, of what use then was the memorandum written on the margin of the bill of lading, "with privilege of reshipping on any good boat," if when the goods, in pursuance of such privilege, have been reshipped the master is not discharged from further responsibility? The answer is tw

the master of the Indian was to receive freight on delivery for the whole distance, whether he reshipped the goods or not, and consequently his obligations were coextensive with his reward; and, secondly, without reserving this privilege, the master of the Indian would have been responsible, after reshipping his goods, even for unavoidable accidents.

If a common carrier, in which character steamboats navigating our rivers must be classed, attempts to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods, and cannot avail himself of any exceptions made in his behalf in the contract.

The skill and experience of the master of the boat, the character of the crew, and the staunchness and speed of the boat, may all be taken into consideration by the owner or shipper of goods in selecting a boat for the carriage of his goods. Having done so, he has a right to require that the contract be fulfilled, in the manner agreed, unless the master of the boat reserves the privilege of re-shipment.

And when this reservation is made, it is still incumbent on the master of the boat, in order to discharge himself from his obligations, to show, by legal evidence, not only that the goods were reshipped on a good boat, but that the goods were lost by the unavoidable accidents of the river. Had the agreement been, that, if the master should reship the goods, he should only receive freight *pro ratâ* for the distance the goods had been carried, a different question would have been presented.

In such a case, however, there can be no doubt that it would have been incumbent on the master to have forwarded, without delay, to the owners or consignee of the goods, a new bill of lading, so that the owner might have evidence against the master of the boat on which the goods were reshipped.

Without notice of the reshipment of the goods, the owner, in case of non-delivery, would not know on whom to call for redress, nor how to search for his goods.

Judgment affirmed.

Metcalf and Frisby, for plaintiff.

Logan, for defendant.

Salisbury v. Gillett.

Walker v. Walker.

SALISBURY v. GILLETT.

2 Scam. R., 290-291.

Error to Morgan.

1. A MISTAKE in, or omission of, the Christian names of the plaintiff can only be reached by plea in abatement.

2. Where partners sue in their firm name, upon a note in an action of debt, it is unnecessary to prove either the partnership or the Christian names of the individual partners under the plea of *nil debet*.

Judgment reversed.

W. Thomas, for plaintiffs.

Leslie, for defendants.

WALKER v. WALKER.

2 Scam. R., 291-295.

Appeal from Cook.

1. On appeal to the Circuit from the Probate Court rejecting a will because of the insanity of the testator, the trial must be *de novo*.
2. It is regular to try the cause upon appeal, before a jury.
3. No other evidence upon the question of sanity is admissible than that of the subscribing witnesses.
4. The subscribing witnesses are not confined in giving their opinion as to the sanity of the testator to the facts which transpired at the time of the execution of the will, but may testify as to *antecedent facts*.

THE general facts were as follows :

At the November term, 1835, of the Court of Probate of Cook county, Rebecca Walker, executrix of the last will and testament of Jesse Walker, deceased, presented said will to the court for probate, and at the same time appeared James Walker, heir of said Jesse Walker, and resisted the probate of said will, on the ground that, at the time of the executing said will, the said Jesse Walker was not of sound mind and memory. The Court of Probate, after hearing the proofs and allegations of the parties, "ordered that the said will and testament be rejected, and that it be not admitted to probate." Rebecca Walker appealed to the Circuit Court of Cook county, where the cause was tried at the August term, 1837, before the Hon. Jesse B. Thomas, and a jury. The jury returned a verdict, that "the proof of the execution of the said will is insufficient to admit it to probate record;" whereupon the Circuit Court affirmed the judgment of the Court of Probate, and the cause was brought into this court by appeal.

The bill of exceptions was in these words :

"Be it remembered, that at a Circuit Court held at Chicago, in and

for the county of Cook, on the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and thirty-seven, this cause, which was brought into this court upon the annexed bill of exceptions, transcript of evidence, and appeal from the decision of Isaac Harmon, judge of probate in and for the county of Cook, came on for trial before his honor, Jesse B. Thomas, the presiding judge of the said court.

"The counsel for Rebecca Walker, the said appellant, moved the said court that the said trial should be before the court without a jury, and that the said trial be upon the transcript of the evidence returned by said judge of probate; his honor the judge decided, that the trial of the said cause should be upon the transcript of the judge of probate, and the appellant's bill of exceptions; that a jury should be impannelled for the trial of said cause, and that, upon the said trial, it would not be competent for either party to introduce any testimony in relation to the sanity or insanity of the testator, except the subscribing witnesses to the said will, who might be sworn and give their evidence before the said jury; that the trial as to all other decisions of the Court of Probate, as appeared from the appellant's bill of exceptions, and the transcript of the judge of probate, should be *de novo*, and that the parties in that respect would not be restricted to the evidence adduced before the judge of probate.

"A jury was accordingly impannelled, and after the testimony had been closed, the counsel for the appellee requested the court to instruct the jury, that unless two of the subscribing witnesses to the said will stated, upon oath, that they concur in the belief that the testator was of sound mind at the time of the execution of the said will, the law is with the appellee; which said instruction, as asked for, was given by the said court.

"The court also instructed the jury, that the said subscribing witnesses, in giving their opinions as to the sanity or insanity of the said testator, might found their opinion not only upon the events which transpired at the time of the execution of the said will, but also upon events which transpired antecedent to the execution of the said will; and that the jury need not inquire into the foundation of the witnesses' belief, nor the circumstances under which, nor the time when, said belief was formed: to which said several decisions, opinions, and instructions of the court, except as to the decision of the court, in regard to the testimony to be introduced on the trial, the said appellant, by her counsel, excepted, and prayed that this her bill of exceptions may be signed, sealed, and made a part of the record.

"J. B. THOMAS." [Seal.]

SMITH, J.—Two grounds of exception have been taken by the appellant in this cause: First, as to the mode in which the appeal from the judge of probate has been proceeded on and adjudicated; and, Secondly, as to the instructions, and the principles embraced in them, applicable to the evidence, as laid down by the judge.

On the first point, the appellant does not complain of the order directing the trial of the cause upon the transcript of the judge of probate, and the appellant's bill of exceptions, but of that portion of the order which directed the impannelling of a jury; and the exclusion of all other evidence in relation to the sanity of the testator, except the subscribing witnesses to the will, who might be sworn and testify; and that as to all other decisions of the Court of Probate, appearing from the bill of exceptions and transcript, the trial should be *de novo*; and the parties not restricted in that respect, to the evidence adduced before the judge of probate.

We do not perceive that this order in the Circuit Court was erroneous. The 135th section of the "*Act relative to Wills and Testaments*," provides that the Circuit Court, in cases of appeal from the Court of Probate, shall proceed *de novo*, as to the judgment and orders appealed from; and that claims for debts may be tried by a jury as in other cases. It would be difficult to understand the meaning of the language here used, did we not consider the terms as implying a new and original hearing of the cause, in the Circuit Court. How shall it proceed *de novo* as to the judgments and orders appealed from, if it does not permit a new hearing of the cause upon its merits? If this be true, how can a rehearing on the merits be had, unless the forms of proceeding used in the Circuit Court in the trial of other cases be adopted? A proceeding *de novo* surely implies a new hearing on the facts and law of the case; and not a mere review, and decision upon the facts and decisions as they transpired, and were had before the Probate Court. The phraseology used in the bill of exceptions, that the trial, as to all other decisions, should be *de novo*, seems to imply, that in regard to the question of the sanity of the testator, the trial was not *de novo*. This is conceived to be rather a misapprehension of the state of the proceedings had, and the use of an ambiguous phrase, which the proceedings as they appear sufficiently explain. The rehearing of the evidence and the verdict of the jury were surely a proceeding *de novo*, on the intrinsic merits of the controversy. The insanity of the testator was the question before the judge of probate, but still it is again retried, and the facts re-examined, and original testimony introduced before the jury—not what remained on paper before the judge of probate. We conceive,

then, that as the Circuit Court is not bound to find the facts, but to pronounce the law arising on the facts judicially proven, it had an undoubted right to direct the impannelling of a jury to find those facts on which its judgment was to be given. The phrase in the act, "that claims for debts may be tried by a jury as in other cases," cannot be considered a negation of the right to impanel a jury in other cases than claims for debts. It is an affirmance of the right in that particular case, but is no prohibition to the adoption of similar proceedings in other cases. The further decision that the subscribing witnesses should alone be permitted to testify to the mental condition of the testator, was certainly proper.

It will be recollected that the object of the proceedings before the judge of probate, and the re-trial in the Circuit Court, was to obtain probate of the will. Two witnesses to the will are required to prove that they were present and saw the testator sign the will, or acknowledge the same to be his act and deed; and that they believed the testator, at the time of signing or acknowledging the same, to be of sound mind and memory. Unless this be done, no probate can be granted. Hence it is most manifest that no other witnesses could be introduced to establish what the law requires shall be alone proven by the subscribing witnesses. The decision to exclude all other evidence of the proof of the execution of the will, and state of mind of the testator, was strictly correct.

On the second ground it satisfactorily appears, that there was no error in the instructions given. The court, in saying that the concurrence of two of the subscribing witnesses in the sanity of the testator, at the time of the execution of the will, was necessary to establish its validity, did but declare what the law says shall be the only evidence in such cases. No error is perceived in the further instructions of the judge in determining that the subscribing witnesses, in testifying as to the mental condition of the testator, at the time of the execution of the will, might found their belief as well upon events which transpired antecedently to the execution of the will, as those which happened at its execution. Whether the testator had been previously subject to aberrations of mind or not, to their knowledge, would surely be a means of testing, in some measure, the accuracy of their judgment, as to his condition of mind at the time of the execution of the will. The facts might be ancillary to the formation of an accurate judgment, and materially aid a just conclusion.

Judgment affirmed.

Butterfield and Collins, for appellant.

Scammon, for appellee.

Webster v. Vickers.

Reed v. Hobbs.

WEBSTER v. VICKERS.

2 Scam. R., 295-297.

Error to Wayne.

1. THE indorsee of a note who acted simply as agent of the payee in procuring the execution of the instrument is a competent witness to impeach the consideration of the note.

2. Where a jury is waived and the cause tried by the court below, the Supreme Court will not, in a doubtful case, reverse the judgment.

*Judgment affirmed.**Ficklin*, for plaintiffs.*Webb*, for defendant.

REED v. HOBBS.

2 Scam. R., 297-300.

Appeal from Sangamon.

1. Where A takes a railroad construction contract, and sub-lets one section of the road to B, and B agrees to conform to the original contract, he cannot recover of A, unless he avers and proves a performance of the original and sub-contract.
2. The term "*excavation*," in a railroad construction contract, is a term of art, and the opinion of engineers is admissible to establish its meaning.
3. The plea of covenants performed is an admission of nominal damages only, if it is the sole issue, and no proof offered in support of its truth.

THIS was an action of covenant upon an agreement, which set forth in substance that Calhoun, Early & Co. were principal contractors upon the northern cross railroad, that they had sub-let a section of the road to Hobbs, that Hobbs agreed in all respects to conform to the contract made by Calhoun, Early & Co., with the State, and C. E. & Co. agreed to pay H. "for each cubic yard of excavation ten cents," and the same for embankments, according to the estimates of the State engineer. The declaration was filed by Hobbs and averred performance and non-payment of the estimates. The defendants C. E. & Co. pleaded generally "performance." The cause was tried by a jury and Hobbs obtained a verdict and judgment for \$311 $\frac{44}{100}$. On the trial the defendant called an engineer and asked him this question. "Whether or not there had been any *excavation* executed by Hobbs, in the meaning of that term as applied to the work in the contract." The question was overruled by the court below upon the ground that the meaning of the word "*excavation*" was one of law and not of art. The Circuit Court directed the jury upon this point in the same manner. When the evidence was concluded the defendants asked the court to instruct the jury. 1. That the plaintiff was not entitled to

Reed v. Hobbs.

Quigley v. The People.

pay for excavations not embraced in the original contract between the State and the defendants. 2. That the plea of covenants performed if untrue admitted the right of the plaintiff to recover *nominal* damages. Both instructions were refused and the defendants excepted.

Judgment reversed.

Walker, Lamborn and Urquahart, for appellants.

Logan and Baker, for appellee.



QUIGLEY v. THE PEOPLE.

2 SCAM. R., 301-302.

Error to Cook.

INDICTMENT for having in possession forged bank bills with intent to utter them as true and genuine, etc.

1. The indictment need not allege that the intent of the prisoner was felonious; it is sufficient to charge the crime in the language of the statute.

2. The *scienter* is the gist of the offence.

3. Where the bills purported to have been issued by a foreign banking corporation, the indictment need not allege the fact that the bank was a body corporate and politic.

4. Where the bank note is set out in the indictment in *hæc verba*, these variances held immaterial.

1. The note was lettered "C."—the indictment omitted this letter.

2. The note was payable to "B. Aymar *or* bearer"—the indictment recited it as to "B. Aymar bearer."

5. An indictment is sufficiently certain which charges the offence in the language of the criminal code or so plainly that the nature of the crime may be easily understood by the jury. The design of the statute was to dispense with the technicalities of the common law, and substitute a simpler mode of proceeding.

6. There is no difference between bank bills and bank notes. The terms are synonymous.

Judgment affirmed.

Caton and Judd, for plaintiff.

Olney, attorney-general, for defendants.

Archer v. Ross.

King v. Jacksonville.

Ayres v. Doe *ex dem.* McConnel.

ARCHER v. ROSS.

2 SCAM. R., 303-304.

Error to Pike.

1. A CIRCUIT judge has no power to appoint a special term to commence at a time when he is bound by law to hold a regular term of his court in another county of his circuit.

2. A reasonable notice of the holding of a special term is due to suitors and witnesses. *Judgment reversed and remanded.*

McDougall, for plaintiff.

W. A. Grimshaw and *C. Walker*, for defendant.



KING v. JACKSONVILLE.

2 SCAM. R., 305-307.

Error to Morgan.

1. A JUSTICE of the peace has *express* jurisdiction in a penal suit brought by a town corporation to recover a penalty less than one hundred dollars imposed by the town ordinances. (a)

2. A town ordinance prohibiting the sale of intoxicating liquors in less quantities than one gallon, without a license from the town authorities, is valid.

3. Such a penalty is not a *tax* within the meaning of the Constitution and charter.

4. Such a suit is properly brought in the name of "President and Trustees" of the town.

5. No precedent action of the town council is necessary to maintain the action. *Judgment affirmed.*

McConnel, *McDougall* and *Lamborn*, for plaintiffs.

Wm. Brown, for defendants.

(a) This decision does not come in conflict with *Bowers v. Green*, 1 SCAM. R., 42. In the latter case the power was claimed by implication; in this case it was expressly conferred.

AYES v. DOE *ex dem.* McCONNEL.

2 SCAM. R., 307-308.

Error to Morgan.

1. In ejectment, where the tenant appears, enters into the consent rule, and pleads to the declaration against the casual ejector, a verdict and judgment thereon will be reversed. The proper practice is to file a new declaration against the tenant when he appears and enters into the consent rule, and confesses lease entry and ouster.

2. An acknowledgment of a deed by husband and wife, in due form, under the act of 1819, where the wife is not privily examined, is sufficient to admit the deed to record, and is sufficient proof of its execution in all collateral actions, but does not pass the dower of the wife.

Ayres v. Doe *ex dem.* McConnel.

WILSON, C. J.—This was an action of *ejectment* to recover the possession of a lot of land in the town of Jacksonville. Several errors are assigned to the opinions and proceedings of the court below, but it will not be necessary to notice more than two of them. The first is that the court proceeded to try and render judgment in the cause, without any declaration having been filed against the defendant. The law and the rules of practice in relation to the action of *ejectment*, are too well settled to require argument or authority to prove that the court erred in trying the cause without a declaration against the defendant.

The next error assigned is, that the court erred in excluding from the jury as evidence, the deed from Thomas Arnett to the county commissioners of Morgan county. The only reason assigned by the court for excluding this deed from being read in evidence, was the insufficiency of the certificate of the acknowledgment of its execution. The validity of this objection will depend upon the certificate itself, and also the law regulating the making and certifying of deeds, in force at the time this was made. First, then, what did the law of 1819 (which is the law governing this case) prescribe in relation to the acknowledgment of the execution of deeds. This law authorizes judges, county commissioners, and justices of the peace, to take the acknowledgment of deeds, but it does not require acknowledgment to be taken and certified in any prescribed form, except it be the acknowledgment of a married woman, when the object is to transfer her right of dower. The certificate of the justice, in this case, would seem, therefore, to be quite as full and exact as was contemplated by the law. It is in these words :

“State of Illinois, Morgan County, March, 1825.

“This day personally appeared Thomas Arnett and his wife, Caycah, before me, James Deaton, one of the acting justices of the peace for said county, and acknowledged the due execution of the within to be their free act and deed, for the within purposes therein named. Given under my hand and seal, day and date above written.

“JAMES DEATON, J. P.” [Seal.]

Had this deed been offered in evidence to prove the transfer of the wife's dower, it would have been properly rejected, because the certificate of acknowledgment is neither in form nor substance, such as the law prescribes in such a case. But as the deed was offered to be read only as the deed of Arnett, it should have been received. The certificate of the justice is as full and as formal, as the law under which it was made required.

Judgment reversed.

W. Thomas, for plaintiff.

McConnel and Leslie, for defendants.

McHenry v. Ridgely.

MCHENRY v. RIDGELY.

2 Scam. R., 309-311.

Appeal from Morgan.

1. Where a promissory note is made by A to B, and B assigns the note by indorsement to C and C indorses to D, as *cashier* of a banking incorporation: *Held*, that D can sue in his own name, as indorsee.
2. Pleas that the note, as indorsed, was the property of the bank, and not of D, the cashier, are insufficient in law to bar the action.
3. Where a note is the property of a corporation, but for convenience has been assigned to one of the officers of the corporation, the action is properly brought in the name of the assignee who was the officer of the corporation.
4. No inconvenience can result from this rule, for if there is a defence to the action, in any conceivable shape, pleas averring the nominal and real interest, and setting forth the defence, will be regarded, if true, as a bar to the action.

THE facts appear in the opinion of the court by

WILSON, C. J.—This was an action by *petition and summons*, by Ridgely against McHenry, upon the following note:

"\$400.

"JACKSONVILLE, Nov. 4th, 1836.

"On or before the sixteenth day of July next, I promise to pay E. W. Palmer or order, four hundred dollars for value received. Witness my hand and seal.

"GEORGE MCHENRY." [Seal.]

On which are the following assignments:

"For value received, I assign the within note to T. Worthington.

"DEC. 12th, 1836."

"E. W. PALMER.

"Pay to N. H. Ridgely, Esq., cashier, or order.

T. WORTHINGTON."

The defendant pleaded three pleas in bar, alleging, in substance, First, That the note sued on was assigned to the president, directors, and company of the State Bank of Illinois, in the name of N. H. Ridgely, Esq., cashier of said bank, according to the usages of the bank, and that the legal and beneficial interest was, by said assignment, vested in the bank. Secondly, That the note is the property of the bank, and that the plaintiff has no interest in it. Thirdly, That the note is the property of the bank, and was assigned to the plaintiff, Ridgely, as its cashier, according to the custom and usage of the bank; and that Ridgely is merely the agent of the bank, without any property in the note sued on. To these pleas a demurrer was interposed by the plaintiff, and sustained by the court. This decision is assigned for error.

It is true, as a general proposition, that a corporation may not only sue in its own name, but when its rights are asserted, it must sue in its corporate name; but the authorities upon this point, and those

McHenry v. Ridgely.

referred to relative to the obligation of the principal, or the one beneficially interested in the suit, are not applicable to the present case. The law is well settled that where a note is payable to bearer, or is indorsed in blank, a suit may be maintained in the name of any person who is the holder of the note, without his being required to show an interest in it, unless he possesses the note under suspicious circumstances; and if the question of *malâ fide possessio*, which is one of fact, to be submitted to the jury, is not raised by the defendant, the court will not inquire into the rights of the plaintiff, but will consider possession of the note as evidence of property. That no injustice may result from this rule, it is also settled that, when the plaintiff on the record is a mere trustee for another, the defendant may avail himself of any defence which he might set up against the real owner of the instrument, provided the action had been brought in his name.

The pleas of the defendant in this case neither raise the question of *malâ fide possessio* in the plaintiff, nor do they set up any defence to the action against the bank. The decision on the demurrer to them was, therefore, in accordance with the general rules adverted to; and is also sustained by several cases directly in point. In one, "where a note was assigned to W. N., cashier of the Farmers' Bank," it was decided that a suit was properly brought in the name of W. N., and not of the bank, though it was for their benefit, for the assignment was made to him individually, and not to the corporation. So it has been decided, "that the mayor and commonalty cannot sue on a bond made to the mayor himself in his own proper name, though he was also styled mayor."

The doctrine is also laid down by Chancellor Kent, and seems to be fully settled by the numerous authorities to which he refers, that blank indorsements may be filled up at any time by the holder, even down to the moment of trial, in a suit brought by him as indorsee, for the purpose of pointing out the person to whom the bill or note is payable; and also that a note indorsed in blank, is like one payable to bearer, and passes by delivery, and the holder may constitute himself or any other person assignee thereof; and the court will not inquire whether he sues for himself, or as trustee for some other person.

Judgment affirmed.

Leslie and McClure, for appellant.

W. Thomas, for appellee.

Olney v. Myers.

OLNEY v. MYERS.

2 Scam. R., 311-312.

Appeal from Will.

1. Where a *minor* sues for work and labor, a *legal* indenture of apprenticeship is a bar to the action.
2. Foreign indentures of apprenticeship constitute a bar to an action for work and labor done by the apprentice outside of the limits of Illinois, and in the State where the relation of master and apprentice was created.
3. An indenture of apprenticeship signed by the minor and his father, in a foreign State, is legal and binding upon the apprentice in Illinois.
4. If an apprentice is removed from a sister State to Illinois, and serves without consent in the latter State, he may recover wages of his master.
5. If a foreign apprentice voluntarily renders service to his master in this State, he cannot recover for work and labor upon an implied *assumpsit*.
6. If the Circuit Court reject relevant evidence, the judgment will be reversed.

SMITH, J.—This was an action for work, labor and services. The declaration is in the usual form, with money counts.

The defendant pleaded *non assumpsit*, and gave notice that he would prove at the trial, that the work, labor and services mentioned in the plaintiff's declaration, and alleged to have been performed by the plaintiff for the defendant, were rendered under a certain indenture of apprenticeship, a copy of which is set out in the notice.

On the trial the defendant offered to give in evidence the depositions of certain witnesses, taken by virtue of a *dedimus* sued out and duly executed, to prove the due execution of the indenture by Myers, the plaintiff, with the assent of his father. The testimony offered is set forth in the bill of exceptions, and most clearly proves the due execution of the indenture by the plaintiff and his father. We are at a loss, from the proceedings as they appear in the record, to conceive upon what ground the Circuit Court rejected the depositions. The evidence was certainly pertinent to the facts in issue, and directly established the defence set up. The time of service specified in the indenture had not expired, even at the commencement of the suit; and as the place of the execution of the indenture and performance of the services to be rendered, does not appear to have been out of this State, we do not perceive upon what ground the evidence was rejected.

If the services were to have been performed in another State, and the plaintiff had been brought here, and an attempt had been made to compel him to perform the service in this State, and he had done so against his free consent, that fact should have been shown in avoidance of the obligation of the indenture; but until that was done, the exclusion of the proof of the due execution of the indenture, was evidently erroneous.

Olney v. Myers.

McConnel v. Thomas.

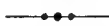
Doe ex dem. v. Miles.

The voluntary performance of the services in the indenture specified to be performed, though rendered out of the State where by the indenture they were to have been rendered by the plaintiff, would not entitle the plaintiff to remuneration therefor.

Judgment reversed.

J. M. Wilson, Newkirk and Butterfield, for appellant.

Scammon and Boardman, for appellee.



McCONNEL v. THOMAS.

2 Scam. R., 313-315.

Appeal from Morgan.

1. WHERE a note is made payable to a certain person—and his official character is added in the undertaking—the legal interest is vested in the payee named.

2. In a case of petition and summons no averment is necessary upon such a note.

3. Interest is an incident to the debt, and need not be specifically averred in a suit commenced by petition and summons.

Judgment affirmed.

McConnel, for appellant.

W. Thomas, for appellee.



DOE ex dem. v. MILES.

2 Scam. R., 315-317.

Appeal from Monroe.

1. A deed is valid as between the parties, although not acknowledged and recorded, provided the execution of the deed is proved, according to the principles of the common law.
2. If a deed is executed in a foreign county, and acknowledged before a justice of the peace of such county, and the land lies in another county, the official character of the justice must be evidenced by the certificate of the clerk of the foreign county.
3. Parol evidence is inadmissible to prove the official character of a justice of the peace in a foreign county.
4. This cause arose under the statute of February 19, 1819.

LOCKWOOD, J.—This was an action of *ejectment* commenced in the Monroe Circuit Court by Doe, on the demise of Semple, against Miles, to recover the possession of the south fractional half of section twenty-three, in township two, south, range eleven, west, of the third principal meridian. On the trial of the cause, the plaintiff offered to prove the execution of a deed made on the 9th day of July, 1821, by Elias Bancroft to William Rector, for the premises in question, and then

to read it to the jury, which was objected to by the defendant's counsel, and the objection sustained by the court.

The plaintiff also offered to prove by witnesses, that Thomas Osborne was a justice of the peace of St. Clair county, in 1826, at which time he took the acknowledgment of a deed from Wm. Rector to Nelson Pepper, for the premises in question; and then to read said deed in evidence to the jury; which evidence thus offered, was objected to by the defendant, and the objection sustained, and therefore the plaintiff submitted to a nonsuit. The assignment of errors questions the correctness of the decisions of the court below, in rejecting the evidence offered to prove the execution of the two deeds. It does not appear from the bill of exceptions on what grounds the court below rejected the plaintiff's evidence. In relation to the deed from Bancroft to Rector, it seems from the written brief, that the evidence was rejected because the deed was not acknowledged and recorded as is required by the 8th section of the act establishing the recorder's office, and for other purposes, passed 19th February, 1819.

This section provides, after directing in what manner deeds relating to real estate shall be acknowledged, that all such deeds shall be recorded in the recorder's office of the county where the lands shall lie, within twelve months after the execution of such deeds; "and every such deed or conveyance that shall at any time after the publication hereof be made and executed, and shall not be proved and recorded aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed of conveyance, under which such subsequent purchaser or mortgagee shall claim."

If the evidence was rejected for the reason supposed, the court erred. The deed was valid, as between the parties to it, without being acknowledged and recorded, and the court had no right to assume that there was a subsequent purchaser or mortgagee, so as to render it fraudulent and void under the statute. We are consequently of the opinion that the evidence of the execution of the deed ought to have been received by the court; and if subsequent testimony rendered the deed void, it should then have been rejected, or the jury instructed to disregard it.

The evidence offered to prove that Osborne was a justice of the peace of St. Clair county was correctly overruled. The 8th section of the act before referred to, authorizes deeds to be acknowledged or proved before some justice of the peace of the county where the deed was executed. But by the 12th section of said act, it is declared law-

Doe *ex dem.* v. Miles.

Morrison v. Rogers.

ful for any justice of the peace of any county of this State, to take the acknowledgment or proof of deeds of any lands being in any other county of this State, which acknowledgment or proof so taken and made, the same being duly certified by the clerk, under the seal of the county, shall be valid and effectual, and have the same force and effect as if the same were taken before any justice of the peace of the county in which the said lands are situate. We are of opinion that the fair construction of these two sections, taken together, only authorizes a justice of the peace of the county where the land lies, to take the acknowledgment, unless the certificate of the clerk of the county is appended to the deed.

It appears by the bill of exceptions, that the deed of Rector to Bancroft was accompanied by a certificate of the clerk of the Circuit Court of St. Clair county, that Osborne was a justice of the peace of St. Clair county.

It is however unnecessary to decide whether the certificate of the Circuit Court was sufficient under the statute, as it was not offered as evidence; and the court below did not decide on its competency.

Judgment reversed.

Cowles and *Krum*, for appellant.

J. B. Thomas and *Reynolds*, for appellee.



MORRISON v. ROGERS.

2 Scam. R., 317-319.

Appeal from Cook.

1. A JUSTICE of the peace has no jurisdiction in trespass *de bonis asportatis*, where the amount in controversy exceeds the sum of twenty dollars. (a)

2. Where a tortious act is committed, and the defendant has not converted the fruits of his trespass into money or money's worth, an action of assumpsit will not lie. (b)

Judgment reversed.

Spring and *Goodrich*, for appellants.

Morris, for appellee.

(a) By statute his jurisdiction has been extended to \$100: Cooke's Stat., 687, sec. 17, clause 12.

(b) But where the conversion is effected, assumpsit lies: Morrison v. Rogers, 2 Scam. R., 318; Dickinson v. Whitney, 4 Gilm. R., 407; Sergeant v. Kellogg, 5 ibid., 280; O'Reer v. Strong, 18 Ill. R., 690.

Teal v. Russell.

Smith v. Finch.

TEAL v. RUSSELL.

2 SCAM. R., 319-321.

Error to Cook.

1. ASSUMPSIT against several—plea by one of the defendants—default as to the others—no disposition of the plea. *Held*, proceedings erroneous; that in actions ex-contractu the judgment must be a *unit*, unless a personal plea is interposed as to one of the defendants.

2. A plaintiff may reverse his own judgment.

3. Where all of the defendants *stipulate* that a judgment may be entered, and one of them files a plea to the action, this is a breach of the stipulation, and the judgment will be reversed.

Judgment reversed.

Butterfield and *Ryan*, for plaintiff.

Peyton and *Spring*, for defendants.



SMITH v. FINCH.

2 SCAM. R., 321-325.

Appeal from the Municipal Court of Alton.

1. THE statute of Illinois relative to the liability of the assignor of a promissory note, does not apply to an indorsement in blank, nor to a guaranty.

2. Where the payee of a note, for a consideration, agrees to guarantee the payment of the note, upon condition that the holder sues the maker, issues an execution, and cannot find property of the maker—*held*, that if the holder recovered a judgment in due season, and issued an execution, which was returned *nulla bona*, his cause of action was complete against the guarantor.

3. Where a note is thus indorsed “pay to A or order,” and signed by B—*held*, the holder had a right to write a guaranty over the indorsement, and that if he neglected to do so, *parol* evidence was admissible to prove that the contract was intended as a guaranty of the payment of the note. (*a*)

4. Where a promise to pay the debt of another arises out of a collateral agreement, based upon a new and independent consideration, the contract is not void under the statute of frauds.

5. A consideration will be sustained where it is beneficial or a detriment to the promisee.

Judgment affirmed.

Cowles and *Krum*, for appellants.

Murdock, for appellee.

Smith v. Finch.

Stone v. The People.

(a) The following decisions have been made by the Supreme Court upon contracts of guaranty: Camden v. McCoy, 8 Scam. R., 537; Cushman v. Dement, *ibid.*, 499; Carroll v. Weld, 13 Ill. R., 684; Klein v. Currier, 14 *ibid.*, 240; Heaton v. Hulbert, 3 Scam. R., 489; Abrams v. Pomeroy, 18 Ill. R., 187; Ryan v. Shawneetown, 14 *ibid.*, 24; Webster v. Cobb, 17 *ibid.*, 459; Rich v. Hathaway, 18 *ibid.*, 548; Harwood v. Kiersted, 20 *ibid.*, 367; Hance v. Miller, 21 *ibid.*, 636.

STONE v. THE PEOPLE.

2 Scam. R., 326-339.

Error to Cook.

Indictment and conviction for murder.

1. When a *grand* or *petit* jury is illegally summoned, the mode of reaching the defect is by a *motion* to quash the indictment, or challenge the array, based upon affidavit. It is too late after indictment and conviction.
2. If, after a capital trial has commenced, the State attorney, who has been guilty of no negligence, discovers that an *alien* is upon the jury, the alien may be discharged and a new juryman sworn in his place, and the trial proceed. (a)
3. The Circuit Courts of this State possess common law powers, and the statute which authorizes the summoning of a special grand jury, or *talesman*, is not to be regarded as restricting the common law powers of the court. If, after the regular grand jury has been discharged, a crime of a capital character is committed, the Circuit Court may award a *special venire* for a new grand jury.
4. Although a public trial is guaranteed by the constitution in all criminal causes, yet, if on account of the public excitement, the court cannot progress without closed doors, and no party, counsel, suitor or witness is deprived of access to the court-room where the trial is progressing, the Supreme Court will not reverse a judgment of conviction, because the bystanders, or those having a curiosity to see the trial, could not have access to the court-room.
5. The fact that an indictment for murder does not specifically describe the locality or character of the mortal wounds inflicted by the accused upon the body of the deceased, cannot be taken advantage of (even if a valid objection), except upon motion to quash the indictment.
6. Under the criminal code, where the judgment of the Circuit Court in capital cases is affirmed, the Supreme Court will fix the time of execution. (b)

SMITH, J.—The prisoner was indicted, tried, and convicted of the murder of one Lucretia Thompson, at the last April term of the Cook Circuit Court. A writ of error having been allowed, and the record certified and transmitted to this court, it is now called on to review and revise the proceedings had in the cause.

Before proceeding to the consideration of the questions presented for our examination and decision, it may not be improper to remark, that in performance of the duty required of the prosecuting attorney on the trial, by the 188th section of the Criminal Code of this State, to certify to the correctness of the record, that officer has made a qualified certificate of its accuracy and regularity, by which a portion of it is excluded, and other parts questioned.

This qualification and exclusion relate to the recitals of the mode of summoning and returning the *venires* and panels of the first and second grand and petit jurors; and the time and manner of their discharge from further service by the court. That such portions of the record, which have been thus excepted to, were irregularly incor-

porated into the record, we cannot doubt, because they could alone have been regularly made a part of the record, by having challenged the array, and thus brought those proceedings before the court; or by a motion, on affidavit of some irregularity in the proceedings connected with the issuing of the *venires*, or the want of power in the court to issue them, and execution by the sheriff, or some defect apparent therein. They formed no more a portion of the proceedings, in this cause, than they did in any other pending at that time in the Circuit Court. We have made these observations, not because the irregularity may be of any direct importance in the consideration of the questions presented, and connected with the facts in this case, in reference to the want of power in the Circuit Court, to order and direct the summoning the grand jury which found the bill of indictment, and the petit jury which tried the cause, because we shall give the prisoner the full benefit of the consideration of all the questions presented by his counsel, connected therewith, but to prevent a presumption that the practice is sanctioned by this court. Having premised thus much, we proceed to the consideration of the main points in the case.

It appears that a grand jury, regularly summoned and duly empannelled, had been discharged during the term of the Circuit Court, having disposed of the business before it; that after such discharge, and during the continuance of the term of the Circuit Court, on the 26th day of April, 1840, the murder charged in the indictment was perpetrated. The prisoner having been accused of the crime, arrested, and being in custody, the Circuit Court, on a special application of the attorney for the State, by an order on its minutes, directed the sheriff of the county of Cook to summon another grand jury to pass on the prisoner's case.

That, on the first day of May following, the grand jury presented the indictment against the prisoner. It further appears from the record, that in pursuance of law, the County Commissioners' Court of the county of Cook, had issued and directed to the sheriff of the county, two *venires* for two petit juries, one to serve for the first week of the term, and the other for the second week of the same term; which were returned duly executed; that the court continuing to sit for more than two weeks, had discharged each of the juries, at the expiration of the time limited for their services, and expressed in the *venires*.

That on the 2d day of May, 1840, the court, by an order on its minutes, directed the sheriff of Cook county to summon a full petit jury of twenty-four good and lawful men, to appear and serve as petit jurors, at such court, on the fourth day of May following.

That on the said fourth day of May, the prisoner was arraigned, pleaded not guilty, and was put on his trial. That a jury of twelve was duly sworn, and the trial proceeded in, and several witnesses examined on the part of the prosecution, when the court, leaving the jury in charge of two sworn officers, under instructions from the court, to keep them together, and prevent all access to them by other persons, adjourned until the next day. On the reassembling of the court on the next day, the counsel for the State gave the court information that Patterson Nickalls, one of the jurors in the cause, was an *alien*, and produced and read a deposition of Nickalls to that effect; and thereupon asked that Nickalls might be withdrawn from the jury, being declared by law incompetent to serve as a juror, and that another juror might be called and selected in his stead. This application was resisted by the prisoner, but the court ordered and caused the juror to be withdrawn and discharged from further serving on the jury, and allowed an additional peremptory challenge to the prisoner, and a *tales* juror was thereupon called, selected, and sworn in the place of the juror discharged. The prisoner moved to discharge the eleven jurors after Nickalls was withdrawn, but the motion was overruled and excepted to by prisoner's counsel. He also objected to being tried by the whole jury, but his objection was not allowed. The persons who had been previously examined, were recalled and re-examined as witnesses, and the trial was recommenced, and proceeded in.

The prisoner's counsel, for the above causes, and because the verdict, as it was alleged, was against the evidence and the instructions of the court, neither of which appear in the record, moved for a new trial, and for the further cause that while a motion was pending before the court after conviction, the door of the court-room was locked by the officer in attendance; all of which grounds were, it appears, deemed insufficient by the circuit judge, and the motion overruled. The deposition of the officer does not show that the act of closing the door was by the command of the judge, and his supplemental affidavit shows that neither ingress was obstructed, nor egress prevented; that he held the knob of the door lock in his hand, ready to permit a passage in or out of the court-room; that the sole object was for the preservation of order in the court-room, where much confusion seems to have prevailed, and that the prisoner had in no way whatever suffered the least inconvenience therefrom. These, it is believed, constitute the whole facts in the case, upon which the prisoner's counsel rely for a reversal of the judgment of the Circuit Court. Six several grounds have been assigned for error. They are as follows:

1st. The Circuit Court had no power to order the sheriff to summon the grand jury, which found the indictment, and their act is void.

2d. The petit jury, who tried the cause, were illegally summoned; and were impannelled without the authority of law.

3d. The court erred in directing the withdrawal, and ordering the discharge of Nickalls from the petit jury, after the trial had commenced, and witnesses for the prosecution had been sworn.

4th. When Nickalls was withdrawn from the jury, it was error not to discharge the whole jury.

5th. For refusing to grant a new trial; and particularly on the grounds stated in reference to holding the court a part of the time with closed doors.

6th. In refusing to arrest the judgment because the indictment does not describe particularly the wounds by which it is alleged the deceased came to her death.

The grounds above stated will be considered in the order they are arranged, and such conclusions stated as the facts, and the law applicable to them, warrant.

While it is not intended to trace the origin and early use of the trial by jury, as it existed in England, nor the sources from whence it is said to have been borrowed, it will not be amiss to consider the mode of summoning grand juries, as practised there. It is understood that a precept was directed to the sheriff of the court, either in the name of the king, or two or more of the justices of the peace, upon which he returned twenty-four or more persons out of the whole county, selecting a sufficient and equal number out of every hundred, from whom the grand jurors were selected, who were qualified as jurors. When the grand jury were duly returned, charged, and sworn, they usually served the whole session or assizes. But the court might, in its discretion, command another grand jury to be returned and sworn, and usually do so on two occasions. The first of these occasions is when, before the end of the sessions, the grand jury having brought in all their bills, are discharged by the court, and after that discharge, either some new offence is committed and the party taken, and brought into jail; or when, after the discharge of the grand inquest, some offender is taken, and brought in before the conclusion of the session.

And the other instance of a new grand jury being sworn, it is said, is, when it is to inquire, under the statute, of the concealment of a former inquest, which provision, though it expressly mentions justices of the peace, extends to the King's bench, and the session of Oyer and Terminer; and this was formerly the proper mode of punishing the grand jurors if they refused to present such things as were within

their charge, and of which they had sufficient evidence ; but this proceeding is no longer in use.

This practice was adopted so far as relates to the impannelling of a second grand jury, in the case of a commission of a new offence, after the discharge of the first grand jury, in the courts of our State, at the earliest period of its State organization ; and has, it is believed, been practised on more or less since. But we proceed to consider the statute prescribing the mode of summoning grand jurors, in force since the 1st of June, 1827. The second section of that act has made it the duty of the county commissioners, in each county in which a Circuit Court is holden, to select twenty-three persons, possessing the qualifications enumerated in the law, and as nearly as may be a proportionate number from each township in their respective counties, to serve as grand jurors.

A summons is to be issued to the sheriff, containing the names, and notice to the persons so selected to attend.

By the 14th section of the act, it is declared, the county commissioners shall so select the grand and petit jurors, that no one person shall serve on the jury a second time, before all fit persons in the county shall have served in rotation.

From these provisions in the act, as there is nothing prohibitory therein of the power of the Circuit Courts to cause grand jurors to be summoned when deemed necessary, for the administration of the public justice of the county, the act must be considered directory to the commissioners. It has not taken away the common law powers of the Circuit Courts, which, as we have by express statute adopted the common law of England, they undoubtedly possess.

The Circuit Courts of this State are superior Courts of general jurisdiction, and have power and authority to hear and determine all cases of treason, felonies, crimes, and misdemeanors whatever, that may be committed within the respective counties in which they are holden.

The respective cases enumerated in the 9th section of the act relative to jurors, when the Circuit Court shall have power to order another grand jury, or a particular number of persons to complete the panel of the jury, to be summoned to supply the omission of the County Court to summon a jury, or to supply the absence of one or more of those summoned, ought not to be considered as abridging the power possessed by the courts at common law.

It is true, that had these courts no common law powers, the want of a grant of such power by statute, would then be conclusive against its exercise. The prisoner is entitled to a speedy public trial, and as he did not object to the trial, because of its speed and promptness, he has

but had the right which the Constitution gave of an early trial. An objection might here have been interposed of a serious nature, as to the manner in which this question has been raised in the court below, but as the counsel for the government has waived all exception as to the form in which the question comes up, we are disposed to give the prisoner the full benefit of a hearing on his exceptions.

By the 153d section of the criminal code, "All exceptions which go merely to the form of the indictment, shall be made before trial, and no motion in arrest of judgment, or writ of error, shall be sustained, not affecting the real merits of the offence charged in such indictment."

The question should have been presented to the Circuit Court, either on a challenge to the array of the grand jury, or on a motion to have quashed the indictment, for the reason, that the indictment was found by a body not legally assembled. If such had been the fact, this would have been the regular course. It was no cause for granting a new trial, because the remedy proposed, would not reach the error alleged in the order directing the summoning of the grand jury.

After indictment found, no objection of irregularity of impannelling a grand jury can be received as a plea to the indictment.

It is however manifest, that the order directing the summoning and impannelling of the grand jury, was the proper exercise of the common law powers of the court; and we perceive no injustice or inconvenience resulting from its exercise.

The second alleged error will be considered.

The same statute, which authorizes and directs the county commissioners to summon grand jurors, also directs the summoning of petit jurors. It appears that the two juries summoned for the first two weeks of the term of the court, were respectively discharged, at the expiration of the time of service for which they had been summoned. It appears by the 5th section of the act relative to the holding of the Circuit Courts, passed 13th February, 1835, that the county commissioners of the several counties, in which the Circuit Courts are allowed to sit two weeks, are authorized to divide the petit jury into two panels; and they are to summon them to attend each panel for one week only. The time of service of the jurors consequently expires with the termination of the week.

Such seems to have been the case on the present occasion, and the court recognizing the rule prescribed by the act, discharged the second jury on the termination of the second week. It is now strongly urged, that the Circuit Court possessed no power to order the sheriff to summon the petit jury which tried the cause; and it is said the order on the minutes of the Circuit Court, for such purpose, was a nullity, and

therefore all proceedings connected with the trial of the prisoner are void.

To test the force and accuracy of this proposition, we recur to the 168th section of the Criminal Code of this State, in which it is declared, that it shall not be necessary to issue a *venire* in any criminal case. And in all criminal cases where the panel of jurors shall be exhausted by challenges or otherwise, and whether any juror has been elected and sworn or not, it shall be competent for the court to order, on its minutes, a *tales* for any number of jurors, not exceeding twenty-four, returnable *instantly*, out of which persons so ordered to be summoned, it shall be lawful to impanel a jury for the trial of any criminal case; but should the *tales* order be sufficient, by reason of challenges or otherwise, to form an impartial jury, the court may, from time to time, make such further orders, on their minutes, for additional talesmen, returnable *instantly*, until a full jury shall be obtained. It will be perceived that the formality of a regular *venire*, has been dispensed with; and by a liberal construction of this section, it would seem to justify the granting of the order to the sheriff to summon the petit jury.

The regular jurors, who had been summoned for the second week, had been, it is true, discharged by the court; but the panel might, perhaps, be said to have been otherwise exhausted than by the challenges, and if so, then the power would be complete, at least by implication, under this section. Without, however, asserting the power under this section, which may be of doubtful authority, after a careful examination of the point, we think there is no difficulty in tracing it clearly to the common law powers of the court. We have already remarked that we adopted the common law of England, and we have also adopted all statutes, made in aid thereof, of a general nature, and not local to that kingdom, prior to fourth year of the reign of James the First, excepting the 2d section of the 6th chapter of 43d Elizabeth, the 8th chapter 13th Elizabeth, and 9th chapter 37th Henry the Eighth; and the 178th section of the Criminal Code declares that all trials for criminal offences shall be conducted according to the course of the common law, except where that act points out a different course.

It will also be perceived that it was, by express law, the duty of the judge of the Cook Circuit Court to continue to hold the term of the court until all the business in the court was disposed of, though more than two weeks had elapsed since its commencement, he not being required to attend and hold a court in another county. This duty was imperative, and the law required it should be discharged.

It has been shown that the Circuit Courts of the State are superior courts of general original jurisdiction.

They are not only so, but are vested, in criminal cases, with almost exclusive jurisdiction. How then was this duty so imperiously required by law to be performed, to be discharged, if the court was powerless, and could not order and command the attendance of a suitable number of jurors for the trial and disposition of causes? Is it not a rational presumption, when the legislative department imposed the performance of this duty, that they conceived the court possessed ample power to execute it; and that if it was not sufficiently conferred by statute, it did exist at common law?

There is no alternative but the adoption of the proposition that its common law powers were commensurate to the performance of the duty, or the supposition that the business required to be disposed of could not be performed; and that a nugatory requisition had been made, which could not be executed. Need it be asked which of the two it is more reasonable to adopt; it must be intended that the jurisdiction and power to try the cause, being not only given, but required by law, the means necessary to the performance of the duties, are to be found in the ordinary common law powers of the court, to cause a jury to be impannelled. We think such a construction eminently conducive to the administration of public justice, and we do not perceive how injurious consequences are to flow from a sanction of the exercise of the power, any more than in any other case. The possible abuse of a power is no legitimate argument against its existence. It is required to be deposited somewhere, and, of necessity, may possibly be exposed to such consequences. The only remedy is punishment for its corrupt exercise. If it is to prevent a failure of justice, the motive is laudable, though if it be clearly not granted, it certainly should not be exercised. The same objection as to the mode in which it seems the question came up in the Circuit Court, is applicable here. The party should have challenged the array of the jury, or moved to quash the order for want of power in the court before trial. The practice in our courts has extensively prevailed as to this mode of summoning juries, and has, it is believed, been almost coeval with the State government. We are not aware that any serious injury has arisen from the exercise of the power. If, however, it is susceptible of abuse, and the streams of justice are likely, at any time, to be polluted by its exercise, the legislative department are entirely competent to provide an adequate remedy, and may interpose a barrier.

On the third point we perceive no error, nor the fourth, which are necessarily so connected as to require to be considered together.

The act relative to grand and petit jurors, already referred to, explicitly prohibits aliens from being jurors. It will not be improper, before referring to some authorities, introduced by the prisoner's counsel, to remark that the character in which jurors act in the United States has not been so generally considered as their position would seem to deserve. The principle that jurors, in criminal cases, act as judges of the law and the fact, is distinctly declared in the 178th section of the Criminal Code, and their right to return general verdicts is unquestioned. Hence the importance, and absolute necessity that they should possess the qualifications required by law, in order legally to enter on the discharge of the duties of jurors.

The juror acts in a *quasi* judicial character. He may decide the law differently from the opinion of the judge, and if the prisoner is acquitted, the verdict, which is the judgment of the jury, cannot be reversed or set aside. To constitute him the judge of the law and the fact, it is indispensable that he be the person declared by the law to enable him to take upon himself the discharge of the duties of the station. His being sworn cannot confer the qualification, nor make him a citizen; the act of selection is a nullity, and he stands as though he never was sworn. It is on this principle that the decision was made in *Guykowski's* case, at the December term, 1838, and the further one, that the party was guilty of no *laches* in not making a challenge to the juror on the trial, because in that case the fact of alienage was unknown until after the trial. The jurors being required to be not only impartial and qualified according to law, but free from all exception, it seems manifest that but eleven competent jurors had been sworn in the cause.

It is said that no juror can be challenged after the trial has commenced, and that the court had no power to discharge or withdraw the juror. This withdrawal of the juror, on the disclosure of his alienage, is not considered a challenge; its effect, it is true, is the same as though he had been challenged; but the court would at any time after he was called, and before he was sworn, at the suggestion of any one, and on the juror's admission of his alienage, have set him aside as wholly incompetent.

On discovery of the fact of alienage, it was communicated to the court, and proof of its truth exhibited by the oath of the juror, which showed his entire disqualification. Now what was the duty of the court on the development of the alienage of Nickalls, he being by statute expressly declared incompetent? Was it not to correct the error, had the suggestion come from any quarter, according to the justice of the case, while the proceedings were *in limine*? As soon

as the error was discovered, the court was asked, to do what? Its duty; and how was that to be best performed? By going through a trial, which, if it resulted in a verdict of guilty, must be set aside *instantly*, on the application of the prisoner; for such is the solemnly adjudicated law of this land; or do what all rational men would suppose should be done, correct the evil, discharge the disqualified person, and perfect the jury? And how is this perfection to be accomplished? By doing what it is objected was erroneous? The remaining eleven jurors, being all competent, and having been all chosen and accepted, as well by the prisoner as the prosecutor, it would have been irregular to have discharged them, and if it had been done without his consent, would have been, we conceive, cause of error; because it would have deprived the prisoner of a right secured to him, and which had been consummated under the law. The court corrected the error to the extent occurring, and could go no further. The case is *sui generis*, and should be decided on principles of analogy. We have been referred to authorities which are admitted to be the rule in the British courts, and if the facts in this case were of the nature which marked the cases that have been decided there, and in like cases in our own courts, we should have no difficulty in coming to the same results on the present occasion. The rule, at common law, undoubtedly is, where a juror is withdrawn by reason of sickness, or any other cause, or where the death of any one ensues during the trial, the remaining jurors are to be discharged, and the prisoner, unless he consents to have the eleven remain, must be tried by another jury. And why is it so? Because the jury has been complete; the whole twelve were competent and qualified jurors. In the cases cited the remaining eleven jurors have been discharged, because one of the competent parts of the jury has been unable to perform its functions; not by an act of the parties, or of the court, but by physical causes beyond the control of both. Not so in the present case. For want of sufficient caution, an error has occurred. Now shall it be said the court possessed no power to correct the error, without prejudice to either party; but that in correcting it, another shall be committed? Not so. Why is a court, for the ends of justice, and where manifest necessity exists for the act, authorized to discharge a jury? And if a whole jury may, in such case, be discharged, why not set aside a person improperly selected and sworn? No injustice has been done; no law has been violated. The rights of the prisoner have not been infringed; the course is agreeable to justice, and we can perceive no wrong in the mode adopted. If a doubt could, however, remain on this point, it is definitely and conclusively settled by the 11th sec-

tion of the act referred to, relative to jurors. "In case of the death, sickness, or non-attendance of any grand or petit juror, after he shall have been sworn upon the jury, or where any such juror as aforesaid, after being sworn as aforesaid, shall, for any reasonable cause, be dismissed or discharged, it shall be lawful for the court to cause others, if necessary, to be summoned, and sworn in his or their stead."

On fifth ground it is to be remarked that there is no question that the constitution of the State has guaranteed a public, as well as an impartial trial; but the causes stated in the deposition do not show that the trial was not public. We should infer from the fact stated in the depositions, that some noise and disturbance prevailed in the court-room, and that in order to avoid the confusion which might have arisen therefrom, the officer caused the doors to be locked. No inconvenience appears to have arisen from the course pursued, and we cannot well see how any could have occurred.

We have no doubt, however, that the doors may be closed for a temporary purpose, where existing circumstances eminently require it to be done; but not for the purpose of excluding any one connected with the trial. The record shows the fact that it occurred while the motion for arresting the judgment was pending under consideration and discussion; and it was consequently after the verdict had been rendered, and trial by jury terminated. We see no cause of error here. The instructions and evidence given in the cause do not appear in the record, and consequently we have no means of deciding the point presented, whether the verdict was against the evidence or the instructions of the judge.

On the sixth and last ground, it is only necessary to remark that the objection to the want of a minute specification of the extent and character of the wounds, charged in the indictment to have been inflicted, is purely technical. If it could have prevailed at all, which we do not believe, it should have been urged on a motion to quash the indictment, as provided in the 153d section of the Criminal Code already quoted.

It is to be further remarked, that with a view to dispense with unnecessary technicalities, and prolixity in indictments, the 152d section of the same code, has declared, "That every indictment, or accusation of the grand jury, shall be deemed sufficiently technical and correct, which states the offence in the terms and language of this Code, or so plainly that the nature of the offence may be easily understood by the jury." The objection cannot prevail.

We are therefore of opinion that there is no error in the record, proceedings, and judgment of the Circuit Court of Cook county, in

Stone v. The People.

McKee v. Brandon.

this cause, and that the same should be, and hereby is affirmed with costs. And this court proceeding under and in conformity to 'the 188th section of "*The Act relative to Criminal Jurisprudence*," of this State, do order, adjudge and decree that the original sentence of death, adjudged by the Circuit Court of the county of Cook, to be executed on the person of John Stone, the prisoner in this cause, and which by the judgment and consideration of the said court was ordered to be executed on the said John Stone, on the twenty-ninth day of May now last past, but which has been respited and superseded, be executed by the sheriff of said county of Cook; and that he cause the said John Stone, on Friday, the tenth day of July, in the year one thousand eight hundred and forty, to be taken from the prison of said county of Cook, where he is now confined, to the place of execution, and there between the hours of twelve meridian, and four post meridian, of that day, he cause the said John Stone to be hanged by the neck until he be dead; and that therefrom he cause the body of the said John Stone to be delivered over to the surgeons named in the record and judgment of the said Cook Circuit Court, for dissection, in pursuance of the statute in such cases made and provided; and for so doing, this order and decree shall be his sufficient warrant.

*Judgment affirmed.**Butterfield and S. Lisle Smith, for plaintiff.**Huntington, States attorney, for defendants.*

(a) *Vide* on this point, *Guykowski v. People*, 1 Scam. R., 480-1; *Greenup v. Stoker*, 8 Gilm. R., 222.

(b) This is the general rule of the Supreme Court, which will be seen in subsequent decisions, but neither the *syllabus* nor *indices* of the reports show the practice. The decisions will be noted in each case separately.



MCKEE v. BRANDON.

2 Scam. R., 339-344.

Appeal from Will.

1. WHERE a party covenants to convey land, and fails to do so, the measure of damages for the breach is the value of the land at the time the land ought to have been conveyed. (a)

2. There were other points in this cause, but not of sufficient importance to justify a syllabus, even.

*Judgment affirmed.**Wm. Thomas, for appellant.**Ford and Spring, for appellee.*

(a) *S. P. Buckmaster v. Grundy*, 1 Scam. R., 810.

McFarland v. Lewis.

Wheeler v. Shields.

McFARLAND v. LEWIS.

2 SCAM. R., 344-347.

Appeal from Warren.

1. WHERE one firm sues another, and the whole evidence demonstrates that each were firms under their respective copartnership names, the *onus* is upon neither party in the Supreme Court.

2. Where a debtor makes a payment to his creditor, when he owes several distinct debts, and the debtor fails to point out upon which debt the payment is to be applied, the creditor has an election to appropriate the payment upon either debt. (a)

3. Where, upon the whole record, it appears that justice has been done, the judgment will be affirmed.

*Judgment affirmed.**A. Williams*, for appellants.*Browning*, for appellees.

(a) S. P. Arnold v. Johnson, 1 SCAM. R., 197; Sproule v. Samuel, 4 *ibid.*, 139; Bayley v. Wynkoop, 5 GILM. R., 449; Jackson v. Bailey, 12 ILL. R., 159; Miller v. Macoupin, 2 GILM. R., 52. The whole law of the court is embraced in the foregoing decisions, and the principles to be deduced from them are:

1. That the debtor in the first instance has a right to direct the application of his payment.
2. If he fails to do so, the creditor has the right to appropriate the money upon any debt he has against the debtor.
3. If neither party make the application until a litigation arises, the courts will direct the appropriation upon the weaker securities, or upon the debt which draws a lesser rate of interest.

WHEELER v. SHIELDS.

2 SCAM. R., 348-351.

Error to Will.

1. IN slander, it is no justification that at the time of the speaking of the slanderous words, the defendant said, "such was the common report." (a)

2. The admission of an immaterial deposition cannot be assigned for error.

3. Where the bill of exceptions does not state that it embraces all of the evidence offered and heard in the court below, the Supreme Court will intend, that other evidence was introduced which sustained the verdict and judgment.

4. The Supreme Court will not grant a new trial unless it is apparent that injustice has been done, or there are strong probable grounds to believe that the verdict and judgment were contrary to the evidence in the cause.

5. Slander causes stand upon peculiar grounds, and courts will reluctantly interfere with verdicts in such cases.

Wheeler v. Shields.

Harmon v. Thornton.

6. *Semble.* A *dedimus pro testatum* commission to take testimony, may be directed to persons and officers, or either of them; if executed by the latter, their official character must appear.

Judgment affirmed.

Spring and *Goodrich*, for plaintiff.

Strode and *S. A. Douglas*, for defendant.

(a) S. P. Cummerford v. McAvoy, 15 Ill. R., 312.

HARMON v. THORNTON.

2 Scam. R., 351-356.

Appeal from the Municipal Court of Chicago.

1. Pleading over, after a demurrer to the declaration, is a waiver of the demurrer. (a)

2. In an action against the assignor of a note, an averment in the declaration, that the maker was insolvent when the note became due, constitutes a good cause of action.

3. Where a jury is waived, and the cause tried by the court, the judgment will not be disturbed by the Supreme Court, unless palpably against the evidence, or the effect of the evidence has been strikingly misconceived.

4. A bill of exceptions must show all of the evidence upon the point of error relied upon.

5. An objection which might have been made in the Circuit Court, and there obviated, if made, will not induce the Supreme Court to reverse a judgment, where the omission is apparent upon the face of the record.

6. The Supreme Court is a court of errors, and no question will be considered by it which was not made in the court below, if it appears upon the face of the record that the question might have been made in the inferior court, and was not.

7. In an action against the assignor of a promissory note, the record of a suit against the maker is admissible to prove diligence in the institution and prosecution of a suit under our statute.

8. Where a jury is dispensed with, and the cause tried by the court below, the Supreme Court will make all intendments in behalf of the judgment, where the bill of exceptions does not, by averment or otherwise, negative this presumption.

Judgment affirmed.

Spring, for appellant.

Scammon, for appellee.

Harmon v. Thornton.

Cowles v. Litchfield.

(a) S. P. Russell v. Hamilton, 2 Scam. R., 57; Lincoln v. Cook, 2 ibid., 61; Peck v. Boggess, 1 ibid., 281; Beer v. Phillips, Bre. R., 19; Wain v. McGoon, 2 Scam. R., 77; Buckmaster v. Grundy, 1 Scam. R., 812; Harmon v. Thornton, 2 ibid., 351; Vanderbilt v. Johnson, 3 ibid., 48; Snyder v. Gaither, ibid., 92; Walker v. Welch, 14 Ill. R., 277; Nye v. Wright, 2 Scam. R., 228; Decklind v. Durrell, 11 Ill. R., 84-5; Gilbert v. Magford, 1 Scam. R., 471; Vincent v. Morrison, Bre. R., 178; Cobb v. Ingalls, ibid., 180; Wells v. Mason, 4 Scam. R., 88. This rule is applicable to pleas, replications, rejoinders and all subsequent pleadings where the party has demurred and pleaded over.

COWLES v. LITCHFIELD.

2 Scam. R., 356-360.

Error to Madison.

1. In an action by the assignee against the assignor of a note made and assigned under our statute, an averment in the declaration that the note was not paid at maturity by the maker; that the assignee sued him at the first term of the court, which was held after the note became due; that a judgment was recovered at the return term, that an execution duly issued thereon, that said execution was placed in the hands of the sheriff and returned *nulla bona* as to part of the demand, shows sufficient diligence to charge the assignor.

2. It is not necessary to issue a *capias ad satisfaciendum*, in order to fix the liability of the assignor.

3. A count in a declaration by the assignee against the assignor of a note, which alleges the insolvency of the maker at the time the note matured, and that an action against him would have been unavailing—shows a good cause of action.

4. Where a declaration contains several counts, and a general demurrer is interposed, and it turns out that one of the counts is good, and the residue bad, the demurrer must be overruled. (a)

Judgment affirmed.

Cowles and Krum, for plaintiffs.

Bullock and Keating, for defendant.

(a) S. P. Young v. Campbell, 5 Glim. R., 82; Walter v. Stephenson, 14 Ill. R., 77; Israel v. Reynolds, 11 ibid., 218; Governor, etc. v. Ridgway, 12 ibid., 15.

So upon a demurrer to a declaration containing several breaches, one of which is well assigned: Stout v. Whitney, 12 Ill. R., 281.

So where there is a general demurrer to several pleas, one of which is a bar to the action: Fitch v. Haight, 4 Scam. R., 52; Stacy v. Baker, 1 ibid., 421.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF ILLINOIS,
IN DECEMBER TERM, 1840, AT SPRINGFIELD.

THE PEOPLE v. NEEDLES.

2 Scam. R., 361.

Motion for Attachment in Supreme Court.

1. WHERE a sheriff fails to return process, the proper practice is to take and serve a rule upon him to return the writ.

2. It is irregular to move for a rule to show cause why an attachment should not issue in the first instance.

3. The affidavit of a relator that he transmitted the writ to the sheriff is sufficient evidence to base a rule, to return the writ upon.

Rule to return writ granted.

F. Forman, for relator.

JAMES v. HUGHILL.

2 Scam. R., 361-362.

Appeal from Tazewell.

IF after an appeal taken, the inferior court permits the sheriff to amend his return, a writ of *certiorari* will be awarded by the Supreme Court, to send up the amended record. (a)

Certiorari awarded.

Logan, for appellants.

E. D. Baker, for appellee.

(a) *Vide* Holmes v. Parker, 1 Scam. R., 567; Cowhick v. Gunn, 2 ibid., 417; Vandyke v. Daley, ibid., 564; Troy v. Reilley, 3 ibid., 19; Jones v. Lloyd, Bre. R., 174-5; Jones v. Sprague, 2 Scam. R., 55; Ellis v. Ewbanks, 3 Scam. R., 584.

The People v. Cloud.

Gorham v. Peyton.

THE PEOPLE v. CLOUD.

2 SCAM. R., 362.

Motion for Mandamus.

1. THE Supreme Court will not, upon an *ex parte* statement, award a *peremptory* writ of mandamus, in the first instance. The proper practice is to issue an *alternative* writ.

2. Where a judgment is rendered by an inferior court, and on the last day of the term a motion for a new trial is entered, and the court adjourned without disposing of the motion; and after the expiration of the term the plaintiff applied to the clerk of the inferior court for an execution, which the clerk refused to issue, because of the pendency of the motion for a new trial—the Supreme Court awarded an *alternative* writ of *mandamus* to the clerk, commanding him to issue the execution, or show cause why he refused to do so.

*Alternative mandamus awarded.**Caton*, for relators.

GORHAM v. PEYTON.

2 SCAM. R., 363-365.

Appeal from the Municipal Court of Chicago.

1. WHERE the Circuit Court tries questions of law and fact, by consent of parties, without the intervention of a jury, its judgment upon the facts is entitled to the same weight—and no more—which is attached to the verdict of a jury.

2. In an action by the assignee against the maker of a note, a plea that the consideration was an agreement between the maker and payee, for the sale and purchase of a certain parcel of land, and that at the time of the execution of the note it was expressly agreed and understood between the parties that the maker should not be called on for payment until the payee obtained a patent for the land from the United States; and that the assignee had notice of the consideration—*Held*, a good bar to the action, the plea averring in addition, that no patent had ever issued.

3. An assignee of a note, with notice of the consideration, although he pays full value for the instrument, takes and holds it subject to all of the equities existing between the original parties.

4. The negative evidence of one witness cannot overthrow the positive recollection of another.

*Judgment reversed.**Caton*, *Scammon* and *Judd*, for appellants.*Spring* and *Peyton*, for appellee.

Townsend v. Griggs.

Heaton v. Kemper.

Ex parte Fellows.

TOWNSEND v. GRIGGS.

2 SCAM. R., 365-366.

Error to Madison.

WHERE a summons in chancery is served by leaving a copy thereof at the residence of the defendant, the return of the officer must affirmatively show that the person to whom he delivered the copy was a "*member of the defendant's family*," that the person with whom it was left was a *white* person, above the age of *ten* years, and that he *explained* to such person the *contents* of the writ.

*Decree reversed.**G. T. M. Davis*, for plaintiffs.*Bledsoe*, for defendant.

HEATON v. KEMPER.

2 SCAM. R., 367-368.

Error to Edgar.

1. AN instruction upon an abstract principle of law ought not to be given to a jury. (*a*)

2. Where a bill of exceptions fails to show the applicability of an instruction asked by the plaintiff, the Supreme Court will not reverse the judgment for a refusal to give the instruction, although the general principle of law set forth in the instruction was correct.

3. What parties have covenanted to do toward each other, and whether they have performed the covenant or not, are questions of fact for the jury. (*b*)

*Judgment affirmed.**Shellady and Linder*, for plaintiff.*Ficklin*, for defendant.

(*a*) *S. P. Vanlangham v. Huston*, 4 Gilm. R., 127; *Stout v. McAdams*, 2 Scam. R., 69; *Heaton v. Kemper*, *ibid.*, 368; *McBain v. Enloe*, 18 Ill. R., 78; *Nealy v. Brown*, 1 Gilm. R., 14; *Atkinson v. Lester*, 1 Scam. R., 407; *Humphries v. Collier*, *ibid.*, 58.

(*b*) The court were in error upon one branch of this *syllabus*. What parties have covenanted to do, is a question of law, upon the construction of the contract. Whether the contract has been performed or not, is a question of fact. This distinction was evidently overlooked: *Vide* 8 John. R., 495; 9 Cow. R., 747; 8 Serg. and Rawle R., 381; 1 Peters' S. O. R., 552; 6 *ibid.*, 499; 11 Whea. R., 59.

Ex parte FELLOWS.

2 SCAM. R., 369.

THE party was licensed as an attorney in September, 1835, and took the oath in 1837, but his name was not enrolled until 1840.

The court held that they would not permit an enrollment *nunc pro tunc*. *Motion denied.*

SAUNDERS v. O'BRIANT.

2 SCAM. R., 369-371.

Appeal from Fulton.

1. The assignee of a note must use diligence by suit to collect the money of the maker, before he can charge assignor.
2. Where the note is sued before a justice of the peace, judgment obtained, execution issued, and returned *nulla bona*, all of these steps having been taken in due course of law, this does not establish diligence. The assignee must file a transcript in the Circuit Court and issue execution, so as to reach the real estate of the maker, and if the execution is then returned *nulla bona*, his right of action against the assignor attaches.
8. In this case it appeared that the maker had no personalty, but did have real estate, and that he was able to pay the debt.

THIS was an action commenced by O'Briant against Saunders, before a justice of the peace of Fulton county, and brought by appeal into the Fulton Circuit Court.

The cause was heard in the court below, at the June term, 1840, before the Hon. Peter Lott. In addition to the evidence stated in the opinion of the court, it appeared, on the trial in the court below, as is shown in the bill of exceptions, that the maker of the note, when called upon by the constable to pay the execution, said he had "no personal property, but he had real property enough." It also appeared from the bill of exceptions, that other testimony was given in the case, on the part of the defendant, tending to show that the maker of the note was able to pay the same, and that it might have been collected from him.

LOCKWOOD, J.—This was an action of *assumpsit* commenced by O'Briant, as assignee of a promissory note, against Saunders, the assignor. The cause was tried, by consent of parties, by the court, without a jury. On the trial of the cause in the court below, O'Briant, in order to prove that he had used due diligence to collect the money from Samuel Porter, who was the drawer of the note, gave in evidence a judgment obtained before a justice of the peace against Porter, and an execution issued thereon, which had been returned by the constable "no property found." On this testimony, the Court below gave judgment in favor of O'Briant, against Saunders. Was this due diligence? Due diligence does not consist in merely instituting suit against the drawer, and prosecuting it to judgment. If the assignee may stop when he has obtained judgment against the drawer, as contended for by O'Briant's counsel, the very object of bringing a suit would be defeated. The life of a judgment is the execution, which puts the plaintiff in possession of the object sought by the suit; it was consequently necessary to obtain execution, and show, by its regular return, that efforts had been made to collect the money.

Saunders v. O'Briant.

Doe *ex dem.* McConnel v. Reed.

But in consequence of the limited jurisdiction of a justice of the peace, real property cannot be reached by an execution issued by him. To remedy this defect, the 29th section of the "*Act concerning Justices of the Peace and Constables*," provides that "When it shall appear by the return of the execution, issued as aforesaid, that the defendant has not personal property sufficient to satisfy the debt and costs within the county, in which judgment was rendered, and it is desired by the plaintiff to have the same levied on real property in that or any other county, it shall be lawful for the justice to certify to the clerk of the Circuit Court of the county in which such judgment was rendered, a transcript, which shall be filed by said clerk, and the judgment shall thenceforward have all the effect of a judgment of the said Circuit Court, and execution shall issue thereon out of that court as in other cases."

The act relative to promissory notes, only makes the assignor liable in case the assignee has used due diligence to collect the money from the maker of the note. In order to show this diligence, it was clearly the duty of the assignee to prove that within the county where the suit was commenced, he had used all the means that the law had furnished him with, to collect the money. It was consequently incumbent on O'Briant to prove that an execution had been issued from the clerk of the Circuit Court, and that it had been returned by the sheriff of the county of Fulton, that Porter had no lands or tenements in the county, out of which the amount of the note could have been collected. For want of this evidence, the judgment is reversed with costs.

Judgment reversed.

Browning, for appellant.

W. Elliot, Jr., for appellee.



DOE *ex dem.* McCONNEL v. REED.

2 Scam. R., 371-374.

Appeal from Morgan.

1. Under the act of January 31, 1827, a certificate of acknowledgment which states the identity of the grantor and his voluntary admission that he had executed the deed, is a full compliance with the statute.
2. An acknowledgment of a deed is a cumulative mode of proving its execution. But the common law remains in full force, and if the certificate is defective, the party offering the deed in evidence may prove its execution by the subscribing witness, or by proof of the hand-writing of the grantor, where there is no witness, or he is dead, insane, or beyond the jurisdiction of the court.
3. A deed is valid between the parties, though not acknowledged or recorded.

LOCKWOOD, J.—This was an action of *ejectment* brought to recover the possession of lot No. 113, in the town of Jacksonville. On the

Doe *ex dem.* McConnel *v.* Reed.

trial of this cause, the plaintiff gave in evidence to the jury, the certificate of the Register of the Land Office at Springfield, proving that Thomas Arnett did in May, 1825, purchase the east half of the N. E. quarter of sec. 20, T. 15 N., R. 10 W., and proved by witnesses, that lot 113, in the town of Jacksonville, is situated in, and is part of, said half quarter section of land, and that one Alexander, upon whom the original declaration was served, was at the time of service in possession of said lot No. 113. The plaintiff then offered in evidence a deed, from said Arnett to the lessor of the plaintiff, for said half quarter section of land, which deed is dated 1st March, 1835, and by which Arnett, for the expressed consideration of five hundred dollars, "remised, released, and for ever quitclaimed" unto McConnel, his heirs and assigns, all his right to said half quarter section of land, and to all and every part of the various lots and divisions of said tract of land, except a small part therein described. On this deed was indorsed an acknowledgment, in the following words, to wit: "State of Illinois, Morgan county, ss. Personally came Thomas Arnett (who, to me is personally known to be the same person that executed this deed, and the identical Thomas Arnett of said county) before me the undersigned, an acting justice of the peace within and for the said county, and acknowledged the foregoing deed to be his voluntary act and deed, for the uses and purposes in said deed mentioned. In testimony whereof, I have hereunto set my hand and seal, at my office, in the county aforesaid, this 21st day of March, 1835. MAT. STACY, J. P." [Seal.] There was also indorsed on said deed, the following certificate, to wit: "Filed 21st March, 1835, and recorded in the Recorder's Office of Morgan County, Ill., in book H, p. 154. D. ROCKWELL, Recorder." To the admissibility of this deed in evidence, the defendant objected, upon the ground that the same was not properly certified by the justice of the peace, to have been properly acknowledged by the said Arnett; which objection was sustained by the court. The plaintiff then produced a subscribing witness to the deed, and offered to prove by said witness, the execution of said deed, whereupon the defendant dispensed with the necessity of swearing said witness, and making no objection to the introduction of such testimony, admitted that said witness would, if sworn, prove that said deed was executed by said Arnett; but objected to reading said deed to the jury, upon the ground only, that the deed being only a release, was inoperative, for the reason that it had not been proved by the plaintiff, that McConnel was in possession of the premises thereby conveyed, at the date of said deed; which objection, as to the effect of the deed, was overruled, and the deed read to the jury.

The plaintiff then closed his testimony, and the defendant offered to read in evidence various deeds of conveyance for said lot of land, to which the plaintiff objected, because the same did not appear to be proved or acknowledged and recorded, as required by law ; which objections were allowed by the court, and said deeds offered by the defendant were rejected.

The defendant then offered to prove the execution of said deeds by witnesses, *ore tenus*, to which the plaintiff objected, on the ground that deeds could not be legally authenticated in the manner proposed, and said objection was sustained by the court ; whereupon the defendant moved the court to withdraw from the jury the deed from Arnett to McConnel, which deed had been admitted without objection, as to the mode of proving the same as aforesaid ; which motion was sustained by the court below, and said deed was rejected as evidence, and thereupon the jury gave a verdict for the defendant.

The errors relied on are, first, that the court erred in rejecting as evidence, the deed from Arnett, because of the alleged insufficiency of the certificate of acknowledgment ; and, secondly, that the court erred in refusing to permit the plaintiff below to prove the execution of Arnett's deed by a subscribing witness.

The 11th section of the act concerning conveyances of real property, passed 31st January, 1827, declares, " No judge or other officer shall take the acknowledgment of any person, to any deed or instrument of writing as aforesaid, unless the person offering to make such acknowledgment shall be personally known to him, to be the real person who, and in whose name, such acknowledgment is proposed to be made, or shall be proved to be such, by a credible witness ; and the judge or officer taking such acknowledgment, shall, in his certificate thereof, state, that such person was personally known to him to be the person whose name is subscribed to such deed or writing, as having executed the same," etc. The evident object of the legislature, in these directions in relation to the acknowledgment of deeds, is to prevent one individual from personating another. This object is fully accomplished in the certificate indorsed on Arnett's deed. The justice certifies, that he is personally acquainted with Arnett ; that he knows that he is the same person who executed the deed ; that he is the identical Thomas Arnett of said county, meaning Morgan county, where the deed was acknowledged, and that Arnett acknowledged the deed to be his act and deed for the uses and purposes in said deed mentioned.

If this certificate is not a compliance with the directions of the statute, the court are at a loss to conceive what would be sufficient.

Doe *ex dem.* McConnell *v.* Reed.Lansing *v.* Birge.Little *v.* Carlisle.

The court consequently erred in deciding that the acknowledgment was insufficient. The court also erred, in rejecting the evidence of the subscribing witness. A deed, whether it be acknowledged and recorded or not, is valid between the parties; and the question whether it is void, as it respects subsequent purchasers, for not being acknowledged and recorded, did not arise in this case.

*Judgment reversed.**McConnel*, for appellant.*W. Thomas*, for appellee.

LANSING *v.* BIRGE.

2 Scam. R., 375.

Appeal from Bond.

WHERE a demurrer is sustained to a plea, it is discretionary with the inferior court to permit the defendant to file an amended or new plea as a substitute; and the refusal of that court to allow a repleader cannot be assigned for error. (a)

*Judgment affirmed.**Cowles*, *Krum*, and *Beaumont*, for appellant.*Shields* and *Field*, for appellee.

(a) S. P. Conradi *v.* Evans, 2 Scam. R., 186; Clemson *v.* State Bank, 1 Scam. R., 46; Weatherford *v.* Fishback, 3 *ibid.*, 175.

LITTLE *v.* CARLISLE.

2 Scam. R., 375-377.

Appeal from Fulton.

WHERE, by a rule of court, a cause is set for trial on the third day of the term, and if no pleas are then filed a judgment by *nil dicit* may be entered, and where the defendant had not been served with process, but notwithstanding appeared on the fifth day of the term, and moved to dismiss the cause for want of security for costs, which motion was overruled, and thereupon the defendant asked leave to file pleas in bar, which the court overruled, and rendered judgment of *nil dicit*. Held, that the judgment was erroneous.

*Judgment reversed.**Logan*, for appellant.*J. B. Thomas* and *Elliot*, for appellee.

Spragins v. Houghton.

SPRAGINS v. HOUGHTON.

2 Scam. R., 377-417.

Appeal from Jo Daviess.

1. The constitution of 1818 provided that, "in all elections, all *white male* INHABITANTS above the age of twenty-one years, having RESIDED in the State for six months, *shall* enjoy the right of an elector."
2. Under this clause of the constitution, it is not requisite that a voter should be a citizen of the United States. It is sufficient that one offering his vote had been for six months preceding the election an *inhabitant* and resident of the State.
3. A *resident* is one who has taken up his permanent abode in the State. It must not be casual or temporary.
4. An inhabitant is one who lives or dwells in a State, and has a fixed and legal settlement there.
5. An alien who is an inhabitant of this State, and has resided within its territorial limits for the space of six months next preceding an election, is a qualified voter under our constitution and laws.
6. Penal statutes must be construed strictly.

THE statute provided that if a judge of election knowingly received, counted and returned an illegal vote, he should forfeit the sum of \$100, to be recovered in any Court of Record by action *qui tam*; one half of which recovery should be for the use of the county, and the other go to the informer. On August 6th, 1838, an election for State and county officers and members of Congress was held in the County of Jo Daviess. At the Galena precinct in said county, on that day, Spragins was one of the judges of election. Jeremiah Kyle, an Irishman and citizen of Great Britain, who had never been naturalized under the laws of the United States, but who had been a resident of Illinois six months next preceding said election, offered to vote at said election, and Spragins, one of the judges of said election, held as aforesaid, knowing all the facts in reference to Kyle, received, counted and returned his vote as a qualified elector under the constitution and laws of Illinois. Houghton informed upon him in an action *qui tam*, instituted in the Jo Daviess Circuit Court, and recovered judgment under the statute aforesaid for \$100 and costs.

The only question was whether Kyle, who was not a citizen of the United States, but an inhabitant of the State of Illinois, six months next preceding the election aforesaid, was a legal voter.

The Supreme Court decided that he was, and the judgment below was accordingly

Reversed.

S. A. Douglas and *McConnel*, for appellant.

C. Walker, Strong and *Butterfield*, for appellee.

Greenup v. Porter. Cowhick v. Gunn. Armstrong v. Caldwell. Elston v. Blanchard.

GREENUP v. PORTER.

2 Scam. R., 417.

Error to Coles.

A WRIT of error lies from the Supreme to the Circuit Court upon decrees rendered upon the chancery side of the latter court.

*Writ of error sustained.**Ficklin and Baker*, for defendants.*Linder*, for plaintiff.

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COWHICK v. GUNN.

2 Scam. R., 417-418.

Error to Morgan.

1. A TRANSCRIPT of the Circuit Court record, sent up to the Supreme Court in return to a writ of error, or upon appeal, is a nullity, unless certified by the clerk under the seal of the court.

2. A *certiorari* can only be awarded, upon an allegation of diminution, where the transcript is properly authenticated.

*Cause stricken from the docket and motion for certiorari overruled.**McConnel and McDougall*, for plaintiff.*W. Brown*, for defendants.

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ARMSTRONG v. CALDWELL.

2 Scam. R., 418-420.

Appeal from La Salle.

WHERE to an action at law the defendant has a legal defence, and neglects to make it before judgment, equity will not afterward relieve him.

*Decree affirmed.**Spring*, for appellant.*Purple*, for appellees.

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ELSTON v. BLANCHARD.

2 Scam. R., 420-442.

Appeal from the Municipal Court of Chicago.

1. FRAUD should be specifically charged in a bill in equity.

2. Where a party has a defence at law, and neglects to make it, equity will not relieve him.

Elston v. Blanchard.

Bank of Washtenaw v. Montgomery.

Hayes v. Gorham.

3. Want of consideration in a note and notice to an assignee thereof is a good defence to the note in a court of law.

4. The payee of a note is a necessary party to a bill in equity impeaching the consideration of a note upon which his assignee has recovered a judgment at law, where the maker seeks to enjoin the judgment, as against the assignee, etc.

Decree affirmed.

Morris and Scammon, for appellant.

Spring and Goodrich, for appellee.



BANK OF WASHTENAW v. MONTGOMERY.

2 Scam. R., 422-428.

Error to Cook.

1. A FOREIGN corporation may sue in the courts of this State.

2. The court intimate that a foreign corporation may contract in this State.

3. Where the record is silent as to the place where a corporation acquired title by indorsement to a promissory note, the Supreme Court will presume that the note was indorsed in Illinois.

4. Where the record is silent as to the locality of a corporation, the Supreme Court will intend that it is a domestic corporation.

Judgment reversed.

Butterfield and Collins, for plaintiff.

Scammon, Peyton and Leary, for defendant.



HAYES v. GORHAM.

2 Scam. R., 429-432.

Error to Putnam.

1. WHERE an indorsement of a note is made at the request of the indorsee for his accommodation or benefit, and with an express agreement that he should not hold the indorser liable, no action can be maintained upon such indorsement against the indorser.

2. In an action by the holder against the first indorser of a note, a second indorser is an incompetent witness for the plaintiff.

Judgment reversed.

O. Peters, for plaintiff.

Logan, for defendants.

Kyle v. Thompson.

Burton v. McClellan.

KYLE v. THOMPSON.

2 Scam. R., 432-433.

Appeal from McDonough.

1. Where the payees have assigned, by indorsement thereon, a promissory note, they cannot sue in their own names upon it.

2. But the possession of the note vests them with authority to strike out the indorsement, the effect of which would be to re-invest them with the legal title.

*Judgment reversed.**Walker, and Browning, for appellant.**A. Williams, for appellees.*

BURTON v. MCCLELLAN.

2 Scam. R., 434-437.

Error to Kane.

Case for firing a prairie, whereby, etc.

1. Form of the declaration.
2. If a party does an illegal act, he is liable for all of the consequences resulting from such.
3. Where the defendant set fire to a prairie after the last day of November, and without giving notice to the plaintiff, who was an adjoining proprietor, and by means of the premises the personal property of the plaintiff was destroyed; *held*, that an action on the case for the injury would lie.
4. The plaintiff in such case is not bound to prove that the fire was willfully kindled, or negligently kept. The *onus* rests upon the defendant to show that the fire was set at a proper time, upon reasonable notice to the plaintiff, and that he used all reasonable precautions to prevent injury to his neighbor, or that he was of necessity compelled, in order to prevent the destruction of his own property, to set a *back fire*. (*a*)

THE declaration, was thus that the "plaintiff, on the thirteenth day of December, in the year of our Lord one thousand eight hundred and thirty-eight, at the place aforesaid, was and still is possessed of about forty acres of land in said county, on which there were twenty stacks of wheat in the sheaf; twenty stacks of barley in the sheaf; twenty stacks of oats in the sheaf; five stacks of buckwheat, and five stacks of hay, around which there was a fence; all of which the defendant well knew; yet the said defendant, at the time and place aforesaid, wittingly, knowingly, and intentionally, kindled a fire on the prairies nearly adjoining the said premises of the said plaintiff, and so negligently and carelessly watched and tended the said fire, that the said fire came into and upon the said premises of the said plaintiff, and consumed the said stacks of grain and hay, and the said fence, of the value of eight hundred dollars; and also, one mile of staked and rail fence on the said premises being situate of the value of two hundred dollars; and consumed the grass and stubble grow-

ing and being on said land, to the damage of the said plaintiff, of one thousand dollars."

Plea, not guilty, and issue thereon. Trial by jury, and verdict and judgment for defendant. The bill of exceptions shows, "that on the trial of this cause it was proved that the defendant had a field inclosed in the prairie, in the county of Kane, and that the plaintiff owned a field, north, about a mile distant from the field or inclosure of the defendant; that in the month of December, 1838, defendant set a fire in the prairie around his inclosure, burying a strip of land around it, for the purpose of protecting it and his fences from the prairie fire; and there was evidence tending to prove that this fire, thus set by the defendant, spread over the intervening prairie, and extended to and destroyed the plaintiff's stacks of grain, which were surrounded by grass, and exposed to be burnt by such fires; though there was other evidence tending to prove that there were other fires that extended to and destroyed plaintiff's stacks.

"There was also evidence tending to prove that there were fires burning on the prairie westerly of the defendant's field, and that a strong westerly wind was blowing, which was rapidly driving the fire toward the defendant's field, and would have reached it in ten or fifteen minutes; and that the direction of the wind was such, that it would have blown the fire directly to the plaintiff's stacks.

"It was also proved, that this last mentioned fire would probably have destroyed the defendant's fence and crops, if he had not protected it by setting a back fire around his field as above mentioned, and that it would also have destroyed plaintiff's stacks.

"The evidence conduced to prove that the defendant commenced firing about the northwest corner of his field; that he extended his fire south, on the west side, and east, on the south side, to the southeast corner; and it was proved that when the fire got around the southeast corner, and was progressing with the wind to the northeast, in the direction of the plaintiff's stacks, the defendant said, 'well it is gone, let it go.' It was also proved, that the plaintiff's stacks were situated in his field, on the prairie, surrounded with grass, and liable to be consumed by fires of the prairies, and that neither his stacks, nor the defendant's field had been ploughed around, or otherwise secured from fire.

"The judge instructed the jury as follows:

"First, That to make the defendant responsible, the jury must believe, from the evidence, that he set the fire willfully, or negligently, or that, lawfully having set it, he negligently permitted it to escape so as to burn the plaintiff's property.

"Secondly, That if the fire had been set by some other person, which was threatening inevitable destruction to the defendant's own farm; and if, in consequence of that, the defendant set out fire around his own farm, for the necessary protection of his own property, and that such fire burnt the defendant's stacks exposed in the same manner the plaintiff's were, such setting fire by the defendant ought not to be considered to be willful, though the fire was set in the month of December.

"Thirdly, That if the defendant set the fire for the purpose set forth in the foregoing instruction, then he is not liable for damages, if he used everything reasonable in his power to prevent it from doing injury to the plaintiff.

"Fourthly, That it was not negligence in the defendant, that he had not previously ploughed round his field, so as to make it unnecessary to set fire for its protection.

"Fifthly, That the burden of proving negligence devolves on the plaintiff, if the defendant has proved that he set the fire for the protection of his own property.

"Sixthly, That negligence may be proved by circumstantial evidence.

"To these instructions the plaintiff excepted."

SMITH, J.—In this case it is only necessary to consider a few plain principles, to determine the points presented.

First, If an illegal act be done, the party doing or causing the act to be done, is responsible for all consequences resulting from the act.

Secondly, If an act be done from evident necessity, and justified by such necessity, but which, without such necessity, would otherwise be illegal, it must appear that such necessity existed at the time, and that every possible diligence and care was taken in the manner of the execution of the act, to avoid injury being done to others, or their property.

Apply these principles to the case under consideration. The authority given by the one hundred and forty-eighth section of the Criminal Code, to fire the prairies, conferred no authority whatever on the defendant to set out the fire in the prairie, because the firing was not done at the period of the year allowed by the section of the law referred to. If the act was done, as is contended, as a means of protection, by making a back fire to protect the defendant's possession, then he was bound to use every possible diligence to prevent injury to others.

The fifth instruction given, which imposed on the plaintiff the neces-

Burton v. McClellan.

Riggs v. Dickinson.

sity of proving the negligence of the defendant, before he was entitled to recover, we think was incorrect. The principles already stated show the converse of the rule. The defendant, to justify the act, should have shown the absolute necessity which existed at the time, for doing the act, and that every possible caution was used to prevent injury. It rested with him to show the excuse and justification, and was not required of the plaintiff.

Judgment reversed.

McConnel and Dodge, for plaintiff.

O. Peters, for defendant.

(a) *Vide* "Criminal Code," Cooke's Stat., 492, sec. 158.

RIGGS v. DICKINSON.

2 Scam. R., 437-441.

Appeal from Peoria.

1. In partition causes the report of the commissioners may be set aside if they have made an unequal, unfair, mistaken, or fraudulent division of the property.
2. If the commissioners divide the quantity equally, but the division is unequal as to quality, their report will be set aside.
3. Affidavits are proper upon a motion to set aside the commissioners' report in a partition proceeding.
4. A bill of exceptions was used in this cause to preserve upon the record the motion and affidavits in support thereof.
5. On reversing an order in partition, because of the illegality of the proceedings of the commissioners, the cause will be remanded, with instructions to the Circuit Court to cause a re-division of the property, in conformity with the principle laid down by the Supreme Court.

THE facts were that the appellees filed a petition for partition under the statute, praying for a division between themselves, as proprietors of the undivided half of the northeast quarter of section eight, in township eight north, range eight east, of the fourth principal meridian, and the appellant, as proprietor of the other undivided half. Commissioners were appointed, who reported as follows :

"We divided the said tract of land into two equal parts, by a straight line drawn from the middle of the north line to the middle of the south line of said tract; and the east half thereof we assigned and set apart to the said Edward Dickinson, James C. Armstrong, Lewis Bigelow, Cyrus Leland, Jacob Gale, Peter Bartlett, and Benjamin Huntoon; and the west half thereof we assigned and set apart to the said Romulus Riggs."

Riggs moved the court below, at the April term, 1839, the Hon. Thomas Ford presiding, to set aside the report of the commissioners, on the ground of inequality of value in the moieties assigned by the commissioners to each party. In support of this motion, he produced

numerous affidavits, stating the half assigned to Riggs to be the least valuable. The appellees resisted the motion, on the ground that mere inequality in the value of the parts divided, was no reason for setting aside the report, etc. They also endeavored to show, that the division was a just one. The court overruled the motion of Riggs, and confirmed the report of the commissioners; to which decision Riggs excepted, and prayed an appeal. The bill of exceptions embodied the facts above recited, and contained all the affidavits referred to. The points made on the trial of the appeal were: 1st, That the court below had the power to set aside the report of the commissioners, on the ground of inequality of value in the parts assigned; and 2d, That the evidence presented by the record proves great inequality to have existed.

SMITH, J.—The points presented for consideration are,

First, Whether the report in this case can be set aside.

Secondly, If so, whether it will be done in a case where equality of quantity has been observed by the commissioners, in the division of the land, but which division may have resulted in great inequality of value.

Thirdly, If so, whether that inequality of value may be shown by evidence in writing, impeaching the report on that ground.

The jurisdiction and practice of courts with reference to proceedings for the partition of lands, are not, in the more early instances, free from obscurity and doubt. In reference to the acts of the commissioners, a largeness of discretion has been vested in them, and a reluctance felt in disturbing their reports, unless manifestly irregular, or wanting in equitable distribution. The early English adjudicated cases furnish but little information, except on general principles, in regard to a case like the present; though the power of the courts to interfere and set aside reports of the commissioners, is distinctly maintained. This power, as has been observed, was exercised with much caution, and where apparent injustice had been done, whether arising from mistake or design.

In the case of *Manners v. Charlesworth*, the power is distinctly recognized, though the court thought that sufficient grounds did not exist, in that case, to require a further inquiry.

In the case of the *Canal Bank of Albany v. The Mayor, etc.*, of Albany, which was a case of assessment of damages in proceedings under the act relative to streets in the city of Albany, the Supreme Court of New York held, "that the persons making the inquisition partake more of the character of commissioners than of a common law

jury, and their affidavit, showing the grounds of their inquisition, will be received to impeach or invalidate it; the rule of law, that the affidavit of jurors will not be received to impeach their verdict, being held inapplicable to proceedings of this kind."

From this authority, it will be perceived, that no doubt remained with the court expressing this opinion, that a report of commissioners could be impeached, because it assimilates the proceedings of the jury to that of commissioners, which could be thus reëxamined.

No doubt, however, of the power of the Circuit Court to disapprove of the report of commissioners can exist; because the 14th section of the act relative to the partition of real estate, has declared, that until the report is approved by the court, it shall not be conclusive on the parties concerned.

The requisition of this approval being necessary to the confirmation of the report, it follows, that the court has a superintending power over the proceedings, and a legal discretion to approve or disapprove of it.

On the second point, the power being established to review the acts of the commissioners, we cannot doubt that a case of inequality of value, as well as that of quantity, would call for the exercise of the power to set aside a report.

The object of the partition is not merely that an equal division of quantity of land shall be made, but of value also. The object is to do justice to all; and, although the quantity might be less in the part allotted to one, yet if it was equal in value to that set apart for the other, it would be an equal division, according to the spirit and intent of the law.

In the case of *Manners v. Charlesworth*, already quoted, the Chancellor remarked: "When the shares of the parties are to be equal, as here, and even where they are not, by means of a little additional arrangement, I suggested during the argument that an obvious course to take for securing equality, was for one party to divide, and the other to choose, subject to the superintendence of the commissioners, which would still be necessary, in order to prevent error from want of skill, and also fraud and collusion, where there were more than two parties. Something of the same suggestion, I find, had occurred to Lord Redesdale, as may be seen in the answer which he gave to the seventh query of the second opinion."

The idea of division by one, and choice by the other, under the superintendence of the commissioners, if it could have been adopted in the present case, would probably have been satisfactory to all; but whether that would have been conformable to the duty of the commissioners, we express no opinion.

Riggs v. Dickinson.

Lampsett v. Whitney.

We have no doubt, that any fact which shows an unequal division of the land, whether of quantity or value, may be shown by depositions, for the purpose of impeaching the report of the commissioners. It may however, be objected in this case, that inasmuch as there appears contrariety of evidence, as to the inequality of value, no certain data is afforded by which to determine the extent of that inequality, if it does in point of fact exist.

From an analysis of the evidence on both sides, we are inclined to the opinion that gross inequality is shown, not only from the testimony adduced on the part of Riggs, the qualified testimony of many of the witnesses on the other side, who speak of equal value for farming purposes, but the undisputed fact, that the half awarded to Dickinson and others lies contiguous to and adjoining the town of Peoria, while the part awarded to Riggs lies remote therefrom. Here we have, in addition to the testimony adduced for Riggs, the concurring fact of the locality and value of the tract awarded to Dickinson, compared with that set apart to Riggs, lying remote from the town.

We consider that these facts greatly outweigh the testimony brought to support the report; and afford good grounds for directing that report to be set aside, and that a division be made of the premises upon the principles of an equality of value, and of quantity, with reference to the value of each part, as nearly as practicable.

This rule to make partition among the parties, quality and quantity, relatively considered, is the uniform one adopted in New York.

The judgment is reversed, with costs, and the cause remanded, with instructions to cause a redivision of the premises, agreeably to the principles of this opinion.

Order reversed.

Walker and Logan, for appellant.

Frisby and Metcalf, for appellees.



LAMPSETT v. WHITNEY.

2 SCAM. R., 441-442.

Error to Madison.

Where an original execution has been issued upon a judgment within one year after the rendition thereof, an *alias* may issue at any time thereafter within the lifetime of the judgment, without continuances upon the judgment record from term to term. (a)

THE facts were, that Lampsett recovered judgment against Whitney in the Madison Circuit Court at the September term, 1823. An original writ of *fi. fa.* issued thereon, Feb. 16, 1824. An *alias fi. fa.*

Lampsett v. Whitney.

Crofts v. The People.

issued Aug. 27, 1825, which was levied upon land and returned, "no sale for want of bidders." A *venditioni exponas* writ of *fi. fa.* issued March 20, 1826, and was returned unexecuted for want of bidders. A *pluries* writ of *fi. fa.* was issued, Aug. 20, 1830, and satisfaction had by sale of real estate. At the October term, 1830, the defendant moved to quash the *pluries*, and set aside the proceedings thereunder. This motion was sustained, and the plaintiff sued out his writ of error.

SMITH, J.—The point made in this case is, whether an execution issued after several years had elapsed from the issuing of previous executions, founded on an execution which had originally issued before a year and a day had expired, was void or voidable because of a want of a continuance from term to term. It is undoubtedly the English practice, and that of some of the States, to enter continuances on the judgment roll, from term to term; but no such practice has prevailed with us.

As the original execution was issued within a year and a day, although more than a year may have elapsed between the period of the issuing and return of the other executions, still we are inclined to the opinion that there was no error in the course adopted; and that the executions so issued were neither void, nor voidable. Let the judgment of the Circuit Court, in quashing the execution last issued, and the order setting aside all subsequent proceedings, be reversed.

Order reversed.

(a) An execution cannot issue after a year has elapsed, without a revival of the judgment by *sci. fa.*, unless an *original* was issued within the year: *The People v. Peck*, 8 Scam. R., 119.

CROFTS v. THE PEOPLE.

2 Scam. R., 442-444.

Error to McHenry.

1. Precedent of an indictment for forging a canal check upon the Chicago branch of the State Bank—approved. (a)
2. The Canal Commissioner had power to draw checks upon the State Bank.
3. Uttering and publishing as true and genuine a forged canal check, is a criminal offence.

THE indictment charged, that the plaintiff in error, on the "twelfth day of July, in the year of our Lord one thousand eight hundred and thirty-nine, in the county aforesaid, [Cook,] a certain falsely made, forged, and counterfeited check, for the payment of money, commonly called a canal check, feloniously did utter, publish, and pass," which instrument is set forth in the indictment in *hæc verba*, directing

the "Branch of the State Bank of Illinois, at Chicago, ninety days after date, to pay to the order of John A. McClernand, treasurer of the Illinois and Michigan Canal, one hundred dollars, and charge the same to the Canal Fund;" dated Lockport, May 1st, 1839, and signed W. F. Thornton, president, and countersigned Jacob Fry, acting commissioner, and indorsed in blank, John A. McClernand. Three checks of the same tenor are included in each count in the indictment. The first count concludes, after setting forth the description, as follows: "with intent to defraud the Board of Canal Commissioners of the Illinois and Michigan Canal, he, the said Charles Crofts, then and there, well knowing the said several checks to be forged and counterfeited, contrary," etc.

The prisoner was tried, convicted, and sentenced to the State prison for one year. Prior to his sentence he moved in arrest of the judgment for the insufficiency of the indictment.

SMITH, J.—Exceptions are taken to the authority of the canal commissioners to issue checks of the character described in the indictment, which are charged to have been counterfeited and passed by the accused.

We have not the least doubt that the commissioners had full power and legal authority to draw drafts of the character described in the indictment; and that the counterfeiting of such drafts or checks, is the commission of the crime of forgery, contemplated in the 73d section of the criminal code.

Equally so, is the passing of counterfeited checks or drafts of the commissioners, of the character described, with an intent to defraud any person, or body politic or corporate, knowing the same to be false and counterfeited, embraced in the 77th section of the same code.

The checks described in both counts of the indictment, are, it is well understood, securities for the payment of money, in the accustomed form, and they are averred to have been counterfeited; and the accused, well knowing that fact, did utter and pass the same with the intent to defraud the Board of Canal Commissioners, and the people of the State of Illinois.

The indictment, though concise, is free from exception, and no reasons are perceived why the judgment should have been arrested.

Conviction affirmed.

Spring and Goodrich, for plaintiff.

Huntington, State attorney for defendant.

(a) This indictment was based upon the criminal code, secs. 78 and 77, which provided that the "forging or uttering" of a forged check for the payment of money, with intent to defraud any person or corporation, should be indictable, etc.: Cooke's Statutes, 385-6.

Tyler v. Young.

TYLER v. YOUNG.

2 Scam. R., 444-448.

Error to Sangamon.

1. Where a note is assigned after maturity, the makers can avail themselves of the same defence which the statute or common law would permit them to set up against the payee. (a)
2. In a court of law, time is regarded as the essence of a contract, and if the parties do not perform on the day fixed by the terms of the agreement, a breach occurs. (b)
3. A plea to an action upon a promissory note, that it was made in consideration of a bond given by the payee to the makers, whereby he covenanted that he would, within four months after the date thereof, convey by deed, with covenants of general and special warranty, a certain parcel of land in fee to the makers, and averring that the payee did not make and deliver such deed of conveyance within the time limited, is a good defence to the suit.
4. A second plea reciting the same considerations and averring that the payee was not, at the time of the execution of the note and bond, nor within four months thereafter, seized in fee, and had not a legal title to said land, is also a bar to the action.
5. A third plea reciting the same consideration, and averring that judgments to a large amount, which constituted liens upon said parcel of land, were, at the time when, etc., outstanding and unsatisfied against the said payee, also constitutes a bar to said action. (c)

ASSUMPSIT upon a note dated January 26, 1837, made by Richard M. Young, Samuel D. Lockwood, Gurdon S. Hubbard, Thomas Mather, and Orville H. Browning, payable to Charles C. Perry, and by him assigned to the plaintiff after maturity. The residue of the facts appear in the opinion by

SMITH, J.—This was an action on a promissory note assigned to the plaintiff after it became due and payable.

The defendants pleaded three special pleas of failure of consideration, to which there was a general demurrer and joinder.

The Circuit Court decided the first and second pleas bad; but that the third was sufficient, and gave judgment for the defendants.

By consent of parties, it is agreed, that all the pleas shall be considered as before the court, for the purpose of determining their sufficiency; and if any one of them shall be considered good, the judgment below is to stand.

To determine the sufficiency of all the pleas, it will be necessary to state the grounds of failure of the consideration stated in each plea.

The first avers, that the note declared on was assigned after it became due, and that it was given as part of the consideration for the execution of a bond of the same date as the promissory note executed to the defendants, by Perry, the assignor, in a large penalty, to convey certain lands, described in the plea, to the defendants, by metes and bounds, by deed, in fee simple, with clauses of general and special warranty, within four months after the date of the same bond; and that Perry did not, within that time, convey the said lands, as covenanted in the said bond, and that, therefore, the consideration of the note had failed.

The second plea recites the same causes, except the omission to convey, but avers that Perry neither at the time of the execution of the promissory note, nor within four months from the date thereof, had any legal title whatever to the lands mentioned in the condition of the bond; and that, therefore, the consideration of the note had failed.

The third plea is the same, except as to the causes of failure of the consideration, which is alleged to be certain outstanding judgments against Perry, to a large amount, rendered in the county of Morgan, which remain unreversed and unsatisfied, and are liens on the lands covenanted to be conveyed.

On these pleas we are led to inquire, whether the facts stated in each would be a bar to the action. By the third section of the "*Act relative to Promissory Notes, Bonds, Due Bills, and other instruments in writing, and making them assignable*," it is expressly provided that if the note be indorsed after the day it becomes payable, the maker shall be allowed to set up the same defence to a suit by the assignee, that he might have done to an action in the name of the original payee. Hence it will be perceived, that if the defence disclosed in the first plea would be good against the assignor or payee of the note, it is equally so against the assignee.

As to the first plea, we cannot doubt that the facts disclosed by the plea would be a bar to the action. For what purpose did the defendants deliver their note, and promise thereby to pay the sum of money stipulated? Was it not for the conveyance of the land with a good title? The moving consideration was the acquirement of the estate, and this they were to possess by the covenants of the plaintiff's assignor, before they were bound to pay the money. The inducement and moving cause is the possession, by legal title, of the estate, and if that is not conveyed, or fails to pass, the promise is a mere naked one, without a consideration.

On the second and third pleas, there is, if possible, less grounds for controversy. If the assignor, Perry, had no legal title to the lands at the time of the making of the note, nor at the time he covenanted to convey the lands, surely this legal inability is a sufficient defence. Upon principles of natural justice it could not be required that the defendants should pay for lands which could never be conveyed to them by the party contracting to convey. And the embarrassments arising from judgments against the assignor, Perry, rendering him utterly unable to make a good title, free from incumbrance, is an insuperable objection, to which no answer can be given. Both these pleas are, then, a bar to the action.

 Tyler v. Young.

The principles here laid down will be found to be sustained by decisions in the case of *Rice v. Goddard*, and *Dickinson v. Hall*, *Frisby v. Hoffnagle*, *Hunt v. Livermore*, and numerous other cases referred to in those decisions.

In the case of the *Bank of Columbia v. Hayner*, the Supreme Court of the United States held that in contracts for the sale of lands, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears; that an averment of performance is always made in the declaration upon contracts containing dependent undertakings; and that averment must be supported by proof; and that it is to be laid down as a rule at law, to entitle the vendor to recover the purchase money, he must aver, in his declaration, performance of the contract on his part, or an offer to perform at the day specified for the performance; and this averment must be supported by proof, unless the tender has been waived by the purchaser.

The time fixed for the performance of a contract is, at law, deemed the essence of the contract; and if the seller is not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end.

Thus the principles avowed in this case sustain the position assumed in the pleas, and fully illustrate the necessity of an ability, in the vendor, to complete his contract on the day named for its performance, and an offer by him to complete it, by a tender of a deed.

Judgment affirmed.

McConnel, McDougall, and S. A. Douglas, for plaintiff.

Walker and Logan, for defendants.

NOTE.—Judge Lockwood, being a party to the cause, did not participate in the decision.

(a) *S. P. Cooke's Stat.*, 292, sec. 8. *Lazell v. Francis*, 4 *Scam. R.*, 421; *Sergeant v. Kellogg*, 5 *Gilm. R.*, 273; *Walter v. Kirk et al.*, 14 *Ill. R.*, 57.

(b) In equity it is a question of intention: *Capps v. Smith et al.*, 3 *Scam. R.*, 173; *Smith v. Brown*, 5 *Gilm. R.*, 314; *Andrews et al. v. Sullivan*, 2 *ibid.*, 334.

Where parties, by contract, stipulate that time shall be regarded as the essence of a contract, the agreement will be enforced as made: *Smith v. Brown*, 5 *Gilm. R.*, 314; *Kemp v. Humphreys*, 13 *Ill. R.*, 573.

(c) Cases upon notes given for the consideration of a bargain and sale of land, where the vendee and payee set up a failure of consideration, etc.: *Miller v. Howell*, 1 *Scam. R.*, 500; *Merriweather v. Smith et al.*, 2 *ibid.*, 31; *Gregory et al. v. Scott*, 4 *ibid.*, 394; *Slack v. McLagan*, 15 *Ill. R.*, 249; *Duncan v. Charles*, 4 *Scam. R.*, 568; *Foster v. Jared*, 12 *Ill. R.*, 454; *Davis v. McVickers*, 11 *ibid.*, 329; *Condrey v. West*, *ibid.*, 150; *Hayes v. Smith*, 3 *Scam. R.*, 427; *Owings v. Thompson*, *ibid.*, 509; *Capps v. Smith*, *ibid.*, 173; *Wagg v. Lane*, *ibid.*, 237; *Evans v. School Commissioners*, 1 *Gilm. R.*, 658; *Purkett v. Gregory*, 2 *Scam. R.*, 44; *Kinzie v. Chicago*, *ibid.*, 187; *Mason v. Walt*, 4 *Scam. R.*, 133; *Gorham v. Peyton*, 2 *Scam. R.*, 363; *Stookey v. Hughes*, 13 *Ill. R.*, 55; *Marsh v. Bennett*, 22 *Ill. R.*, 313.

Gleason v. Edmunds.

GLEASON v. EDMUNDS.

2 Scam. R., 448-452.

Appeal from La Salle.

1. Construction of the statute defining the extent of the possession of squatters' claims to public lands.
2. Where a statute recognizes claims of squatters "according to the custom of the neighborhood in which such lands may be situated," questions to a witness tending to elicit the facts relating to the "custom," are relevant and proper.
3. Under this statute an *inclosure* is not essential to the validity of the *claim*.
4. It is not even necessary that the claimant should reside upon the claim, or immediately adjoining it. It is sufficient if he reside "*near*" to the claim, and has taken the precaution to "plainly mark" the boundaries of his right, so as to distinguish it from the adjacent lands.
5. It is not essential that the claimant should be the head of a family.
6. Under this statute the claimant may select and stake out two separate tracts, one a timber tract, the other prairie, if such is the custom of the neighborhood, although they do not adjoin each other; provided the two do not exceed 320 acres.
7. Where several join in a plea of justification in trespass, the plea must be sustained as to all, in order to constitute a bar to the action.

TRESPASS *q. c. f.* verdict and judgment for plaintiff. The bill of exceptions is in these words :

"Be it remembered that on the trial of this cause by jury, plaintiff called a witness, Mr. Platt, and asked him, among other questions, 'What acts of improvement or cultivation has the plaintiff done on the public unsurveyed lands in this county?' objected to by defendants, admitted by the court; plaintiff next asked same witness, 'What is the custom of the neighborhood in relation to holding claims?' objected to by defendant, and admitted by the court. The plaintiff then asked witness, 'If two pieces of land be claimed, one on the prairie, and one in the timber, not exceeding 320 acres in all, what is the custom in your neighborhood in relation to it?' objected to, and overruled. Next question, 'How is land so claimed in your neighborhood counted, one or two claims?' objected to, but overruled and asked. The defendants' counsel asked, among other instructions, the court to instruct the jury, 'That unless the jury shall believe, from the evidence, that the said plaintiff, at the time of the committing of the said supposed trespasses, had the premises inclosed by a fence, the law is for the defendants.' The court refused to give the instruction. Secondly, Defendants asked the court to instruct the jury, 'That the jury must believe from the evidence that the plaintiff, at the time of the committing of the trespasses, was settled upon the same government lands in said declaration mentioned, and not on a separate and distinct tract of land, than the one on which said supposed trespasses were committed, in order to enable the plaintiff to recover under the act entitled, '*An Act to define the extent of Possession in Cases of Settlement on the Public Lands*,' and that said settlement, under said

act, cannot extend the claim to separate tracts not adjoining the one settled upon.'

"Thirdly, 'That if the jury shall believe from the evidence that the only settlement of the plaintiff on the tract of land on which the supposed trespasses are alleged to have been committed, consists of the marking out of the claim, that such evidence does not in law constitute a settlement.' The above instructions in the words of them were refused; but the court then instructed the jury, that the question of settlement was one of fact applied to the act, to be ascertained by the neighborhood of country in which the trespass was committed; and if the jury believed from the evidence that the plaintiff has settled on the unsurveyed public lands, according to the spirit and intendment of the act referred to, and such claim did not exceed 320 acres, and was ascertained by land-marks, so plainly made that the same might be designated from other lands contiguous thereto, in the same neighborhood of country, that they might find for the plaintiff, if they also believed, from the evidence, that the defendant had committed trespasses on the plaintiff's claim. The court further said, that if the jury believed from the evidence that the plaintiff was a man without a family, yet, if they believed he had made all the landmarks mentioned in the statute, and was by the witnesses of the neighborhood, considered after such marks, a settler, that then they also might thus find, as that was a question of fact for the jury to determine from the evidence and not for the court. The court also instructed the jury, that if they believed from the evidence, that this claim, not exceeding 320 acres, was separate, the prairie disconnected from the timber, and that they believed it was one claim from the witnesses from the same neighborhood of country where the claim was made, that then they might find the fact that if the trespasses were committed on one of the pieces so recognized by the neighborhood as the plaintiff's claim. The court further instructed the jury that a plea of justification for several defendants, if bad in part, was bad for the whole; and that if they should believe from the evidence that one of the defendants had, prior to the settlement on the claim spoken of, erected a brush fence, and he, at the time of the supposed trespasses, resided not on this, but on his own land bought of government, and this fence was broken down, or in part taken away, so as not to make it an inclosure, as contemplated by law, that his former acts of making the fence were no justification to the trespass, unless he resided on the land, or claimed it according to the meaning of the statute in question; and that, although one of the defendants might, under certain circumstances, be excused if he had rightly pleaded, but if they

Gleason v. Edmunds.

Myers v. Aikman.

had all justified, when it was only a justification to part, that the law was for the plaintiff.

"To the giving of the last instructions, and refusing the ones asked, the counsel excepts, and prays this bill of exceptions to be signed and sealed; which is done in open court."

SMITH, J.—The errors assigned in this case questions the correctness of the decision of the circuit judge, in permitting certain questions, stated in the bill of exceptions, to be answered by the witness; and in refusing to give certain instructions prayed for by the counsel of the appellants in the court below.

The peculiar character of the controversy in this case arises out of an act of the legislature of this State, relative to claims upon the public lands of the United States, situated in this State, providing for the definition of the extent of settlements on the public lands, and declaring that in cases of controversy, "the possession shall, in the absence of paper title, be considered, on the trial, as extending to the number of acres embraced by the claim of such person, according to the custom of the neighborhood in which such lands may be situated."

Applying the questions propounded to the witness, under the principles of the law recited, no error is perceived in permitting answers to be given; they were relevant to the matter in controversy, and regular; nor is any error perceived in refusing to give the instructions asked. The matters seem to have been, as far as we can judge from the record, fully investigated, and we feel no disposition to disturb them.

Judgment affirmed.

Spring, for appellants.

Caton, for appellee.

NOTE.—As to the history of legislation and litigation in Illinois, in reference to the rights of occupants of the public lands, *vide* Cooke's Stat., 293-4 and 502: *Turney v. Saunders*, 4 Scam. R., 527; *Switzer v. Skiles*, 3 Gilm. R., 529; *Sergeant v. Kellogg*, 5 *ibid.*, 273; *Hutson v. Overturf*, 1 Scam. R., 170; *Lovett v. Noble*, *ibid.*, 185; *Wincher v. Shrewsbury*, 2 *ibid.*, 254; *Brown v. Throckmorton*, 11 Ill. R., 529; *Gleason v. Edmunds*, 2 Scam. R., 448; *Davenport v. Farrar*, 1 *ibid.*, 814; *Delauny v. Burnett*, 4 Gilm. R., 454; *Taylor v. Davis*, 11 Ill. R., 10; *Wilcoxon v. McGhee*, 12 *ibid.*, 831; *Blankenship v. Cutrell*, 16 *ibid.*, 62.

MYERS v. AIKMAN.

2 Scam. R., 452-453.

Appeal from Edgar.

A PLEA to an action on a note that it was executed in consideration of a sale, by the payee to the maker, of a parcel of land which the

Myers v. Aikman.

Allen v. Downing.

Scammon v. Cline.

payee represented he had a good title to, and averring that the payee had no title, is a good defence. (a)

Judgment reversed.

S. A. Douglas, for appellant.

J. G. Bowman, for appellee.

(a) *S. P. Tyler v. Young et al.*, 3 Scam. R., 444.

ALLEN v. DOWNING.

2 Scam. R., 454-456.

Appeal from Bond.

WHERE a subpoena for a material witness has been issued and returned "not served," because of the absence of the witness in a foreign county where he was attending a dying son, a continuance will be granted upon affidavit of these facts. (a)

Judgment reversed.

J. Gillespie, for appellants.

Dale, Shields and Field, for appellees.

(a) The statute upon which this decision was based, is in these words:

"Whenever either party shall apply for the continuance of a cause on account of the absence of testimony, the motion shall be grounded on the *affidavit* of the party so applying, or his, her, or their *authorized agent*, showing that *due diligence* has been used to obtain such testimony, or the *want of time* to obtain it; and also the name and *residence* of the witness or witnesses, and what *particular fact or facts* the party expects to prove by such witness or witnesses; and should the court be satisfied that such evidence would *not be material* on the trial of the cause, or if the opposite party *will admit the fact or facts* stated in the affidavit, the cause *shall not be continued*." Cooke's Stat., 260.

This statute has been construed in the following cases: *Lee v. Bates*, 1 Scam. R., 528; *Adams v. Colton*, 2 *ibid.*, 71; *Lyon v. Boivin*, 5 Gilm. R., 629; *Vickers v. Hill*, 1 Scam. R., 309; *Dunlap v. Davis*, 5 Gilm. R., 84; *Illinois Mutual Ins. Co. v. Marsalles Manufacturing Co.*, 1 Gilm. R., 260; *Burlingame v. Turner*, 1 Scam. R., 589; *Willis v. People*, *ibid.*, 402; *McBain v. Enloe*, 13 Ill. R., 76; *Ault v. Rawson*, 14 Ill. R., 490; *Bailey v. Hardy*, 12 *ibid.*, 459; *Bruce v. Truett*, 4 Scam. R., 456; *Wade v. Halligan*, 16 Ill. R., 507; *Babcock v. Trice*, 18 *ibid.*, 439; *Stevenson v. Sherwood*, 22 Ill. R., 238; *Eames v. Hennessy*, *ibid.*, 623.

SCAMMON v. CLINE.

2 Scam. R., 456-457.

Error to Boone.

AN appeal from a justice of the peace is to be regarded as taken, when the appeal bond is filed with the justice or clerk of the court, and no action of the legislature or neglect of the judge of the court, or of the clerk or justice can defeat it. (a)

Judgment reversed.

Spring and Scammon, for plaintiff.

Lincoln and Loop, for defendant.

(a) *S. P. Campbell v. Quinlan*, 3 Scam. R., 388; overruled: *Little v. Smith*, 4 *ibid.*, 400; *Ewing v. Bailey*, 4 *ibid.*, 420.

Beaubien v. Sabine.

Cushing v. Dill.

BEAUBIEN v. SABINE.

2 SCAM. R., 457-460.

Error to Municipal Court of Chicago.

1. BY statute, where the Circuit Court, or any other court of concurrent jurisdiction, have no public seal provided, the private seal of the clerk is a sufficient authentication of a writ, until the court seal is designed and ready for use.

2. The presumption is in favor of the jurisdiction of a superior court of general jurisdiction. (a)

*Judgment affirmed.**Peyton*, for plaintiff.*Butterfield*, for defendant.

(a) S. P. Vance v. Funk, 2 SCAM. R., 268; Beaubien v. Brinkerhoff, *ibid.*, 272; Propst v. Meadows, 18 Ill. R., 169; Kenney v. Greer, *ibid.*, 432; Gillilan v. Gray, 14 *ibid.*, 416.

CUSHING v. DILL.

2 SCAM. R., 460-462.

Appeal from Edgar.

1. In trespass by the "owner" of land to recover the penalty of \$8 a tree for cutting and felling timber, the act of the defendant must be "willful," to entitle the plaintiff to a recovery. (a)
2. A principal is not liable for the willful acts of his agents or servants, unless he advised or directed or assisted in the commission of the trespass.

WILSON, C. J.—In an action of *debt* by Dill against Cushing to recover the penalty given by the "*Act to prevent trespassing, by cutting timber*," the testimony proved that the trees sued for were cut upon the land of Dill; not, however, by Cushing in person, but by those employed by him to cut and hew timber; that he directed them to cut the timber on his own land, and cautioned them against cutting timber on any other person's land, and after it was hewed, it was appropriated by the persons in his employ to his use. It does not appear that he showed the workmen the lines of his land, or designated it in any other manner.

Whether, under these circumstances, the cutting of the trees in question, by the hand in Cushing's employ, was the result of his employment and directions, by reason of his not having designated his land in such a manner as to enable the workmen to distinguish it from that of another, and whether he would not therefore be liable in another form of action, upon the principle that the master is liable for the acts of his servant, done in the execution of his master's orders, are questions which do not arise in the investigation of this case, although counsel seem to regard the settlement of these points

Cushing v. Dill.

Beecher v. James.

as deciding the case. This action is brought upon a penal statute, the object of which is to punish the wrong-doer, as well as to recompense the injured individual. To subject any one, therefore, to the penalty of the act, it must be shown to have been willfully violated, by proof that the party charged, committed the forbidden act himself, or caused another to do it by his command or authority. The statute gives the penalty against the actual trespasser only; it would be a violation of legal principles, therefore, to extend it so as to embrace another by implication.

The liability arising from the relation of master and servant is founded in policy, but the implication of authority in the servant, that would render the master liable in many cases in a civil suit, would not be sufficient to convict him in a criminal or penal prosecution. The maxim, *qui facit per alium, facit per se*, would be strictly applicable in an action of trespass against Cushing, but in this prosecution he is liable only for his personal acts, or such acts of his workmen or servants as are proved to have been done by his express, or at least necessarily implied authority.

There is no proof of such acts, or such authority having been given by Cushing, to those who committed the trespass; he cannot, therefore, be considered liable under the statute.

Although Dill cannot recover in this action, he is not without a remedy for the injury sustained. That given by the statute is in addition to the remedy at common law, and an action under it would not be a bar to a suit at common law in any result.

Judgment reversed.

Wells, for appellant.

Bowman, for appellee.

(a) S. P. Whitecraft v. Vanderver, 12 Ill. R., 289.



BEECHER v. JAMES.

2 Scam. R., 462-464.

1. APPEARANCE and pleading, or the taking of any other step toward the trial of a cause upon its merits is a waiver of any irregularity in process or other formal proceedings. (a)

2. An attachment in aid of a summons is a process, and a part of the proceedings in the original cause.

3. The word "term" in that section of the statute authorizing the issue of attachments in aid of suits commenced by summons, means "time." (b)

Beecher v. James. Brewster v. James. Holbrook v. James. Holbrook v. Vibbard.

4. An affidavit upon which an attachment in aid is based—is amendable on motion. (c)

Judgment reversed.

Yates, for appellants.

McClure, for appellees.

(a) S. P. Vance v. Funk, 2 Scam. R., 268; Rust v. Frothingham, Bre. R., 259; Easton v. Altum, 1 Scam. R., 250; Frink v. Flanagan, 1 Gilm. R., 88; Norton v. Dow, 5 ibid., 461; People v. Pearson, 8 Scam. R., 271.

But appearance for the purpose of moving to quash is not a waiver: Schoonhoven v. Gott, 20 Ill. R., 46; Coleen v. Figgins, Bre. R., 3.

(b) *Vide* Cooke's Stat., 235, sec. 80.

(c) S. P. Cooke's Stat., 229, sec. 8. Hunter v. Ladd, 1 Scam. R., 551; Parkett v. Gregory, 2 ibid., 44; Beecher v. James, ibid., 462; Miere v. Brush, 3 ibid., 28; Campbell v. Whetstone, ibid., 361; Frink v. King, ibid., 150. (Clark v. Roberts, Bre. R., 222, was decided upon common law principles.)

BREWSTER v. JAMES.

2 Scam. R., 464-465.

Appeal from Morgan.

SAME points as in the preceding case.

Judgment reversed.

Yates, for appellants.

McClure, for appellees.

HOLBROOK v. JAMES.

2 Scam. R., 464-465.

Appeal from Morgan.

SAME points as in the two preceding cases.

Judgment reversed.

Yates, for appellants.

McClure, for appellees.

HOLBROOK v. VIBBARD.

2 Scam. R., 465-468.

Error to Municipal Court of Chicago.

1. THE *lex loci* governs as to the validity and construction of contracts and the liability of the parties thereto. (a)

2. This rule applies to the indorsement of a foreign bill or note. The liability of each party to the bill is according to the law of the place, where they respectively made their several contracts.

3. Where a note is made and indorsed in the State of New York by citizens of Illinois, but payable in Illinois, the law of New York controls the contract of the indorser.

Holbrook v. Vibbard.

Evans v. Pierce.

4. Where there are special counts upon a note, and the usual common counts are added, and the defendants plead the general issue to the whole declaration and special pleas in bar to the counts, upon the note, and the plaintiffs reply to the special pleas to which the defendants demurred and the court sustained the demurrer and rendered judgment for the defendants. *Held*, the proceedings were regular.

Judgment affirmed.

Butterfield and Collins, for plaintiffs.

Spring and Goodrich, for defendants.

(a) S. P. As to *lex loci contractus*: *Bradshaw v. Newman*, Bre. R., 94; *Stacy v. Baker*, 1 Scam. R., 417; *Humphrey v. Powell*, Bre. R., 281; *Forsyth v. Baxter*, 2 Scam. R., 12; *Sherman v. Gassett*, 4 Gilm. R., 521.

EVANS v. PIERCE.

2 Scam. R., 468-470.

Appeal from Greene.

1. The jurisdiction of a justice of the peace is conferred by statute; the statute is the charter of his authority, and in obtaining and exercising his powers he must strictly conform to the law.
2. He can acquire jurisdiction over the person of a defendant in suits commenced by summons, in one of two modes only; 1, by the service of the process; or, 2, by a voluntary personal appearance of the defendant. (a)
3. The justice cannot render a judgment by confession upon the authority of a letter written to him by the defendant, although the latter has been served with process.
4. A creditor cannot redeem land sold under execution, under a judgment which is absolutely void for want of jurisdiction in the court rendering it. (b)
5. A *mandamus* lies to compel a sheriff to execute a deed for land purchased under execution, where a void redemption has intervened.

WILSON, C. J.—By virtue of an execution, the sheriff of Green county sold a tract of land belonging to Samuel C. Pierce, to John Evans, and gave him a certificate for a deed at the expiration of the time of redemption.

Prior to that time, Pierce sent a letter to a justice of the peace, authorizing him to enter judgment against him, in favor of Thomas, for an amount named, stating that he waived service of process; upon which the justice rendered a judgment in favor of Thomas, who then proceeded as a judgment creditor of Pierce, to redeem the land sold to Evans, and accordingly paid the sheriff the amount that Evans had given for the land. Evans contested Thomas' right to redeem the land, and applied to the court for a *mandamus* to compel the sheriff to make him a deed to the land, in conformity to his certificate of purchase. Pierce, Thomas, and the sheriff, made themselves parties to the motion, and, by consent, a judgment, *pro formâ*, was entered against Evans, from which he appealed to this court.

The first question that arises is in reference to the jurisdiction of

the justice, in the case of *Thomas v. Pierce*. That he had jurisdiction of the subject matter of the suit, there is no doubt; but did he acquire jurisdiction over the person of Pierce, by having him personally before him, or by legally notifying him of the proceeding against him, in the manner required by law? A justice's jurisdiction is conferred by statute, and in its exercise he must proceed in strict conformity with the manner prescribed. Has that been done in this case? The statute directs that suit before a justice of the peace shall be commenced by a summons, the form of which is given, and that it shall be served upon the defendant, by reading it to him; upon the return of this process, executed by the proper officer, or upon the parties appearing in person before the justice, and agreeing to waive process, he may proceed to hear and decide the cause. In this case, however, the parties neither appeared and waived process, nor was there any process served. There was, therefore, neither cause nor parties legally before the justice to authorize his rendering judgment. The letter of Pierce did not warrant it, because the law having prescribed a different mode of acquiring jurisdiction of the person of the defendant, it must be strictly pursued, and cannot be varied at the will of the party or the justice. In the case of ————, it was decided that where the law requires a copy of the petition and summons to be served upon the defendant, an acknowledgment of the service thereof, purporting to be indorsed by the defendant, will not authorize a judgment by default, nor can such acknowledgment be proved in the defendant's absence. Although the letter of authority to the justice purports to be that of Pierce, yet it may not be genuine, and there is no way of ascertaining that fact; its authenticity cannot be proved in his absence. To institute such an inquiry would be adjudicating upon the rights of the party in his absence, and without notice to him of the nature of the proceeding.

Inasmuch, then, as the justice had no jurisdiction in the case of *Thomas v. Pierce*, his judgment in favor of the former was not merely voidable, but totally void; and as no one can acquire any benefit or right under, or by virtue of a void judgment, Thomas acquired no right to redeem as a judgment creditor, his judgment being void. This fact it was perfectly competent for Evans to establish when the judgment was interposed as a bar to his rights; and having done so, and Pierce having failed to redeem the land in question within the time allowed by law, and Thomas having no right to do so, the sheriff was under a legal obligation to make a deed to Evans, agreeably to the terms of sale. The judgment of the Circuit Court is therefore reversed, and the cause remanded, with instructions

Evans v. Pierce.

Waldo v. Williams.

Kinney v. Hudnut.

to that court to proceed in the disposition of the case, according to this opinion.

Judgment reversed and remanded.

Logan, for appellant.

(a) S. P. Nelson v. Rockwell, 14 Ill. R., 377; *vide*, also, Hopkins v. Walter, 11 *ibid.*, 548.

(b) S. P. Maxcy v. Clabaugh, 1 Gilm. R., 29.



WALDO v. WILLIAMS.

2 Scam. R., 470-472.

Error to Morgan.

1. WHERE in an equity cause all of the parties have been notified, and had an opportunity of being heard in their own defence, an interlocutory decree will not be reversed, simply because one of the parties, defendant, was not in court at the time the interlocutory decree was rendered.

2. Where several tracts of land have been mortgaged, and the mortgagee files a bill to foreclose, the fact that the decree orders the sale of all of the parcels, does not constitute an error. It is the duty of the master or commissioner to sell in separate parcels, and when enough has been realized to satisfy the debt, stop the sale as to the residue. If any fraud or injustice occurs, the remedy of the injured party is to move to set aside the sale.

Decree affirmed.

Brown and Lamborn, for plaintiffs.

McClure, for defendant.



KINNEY v. HUDNUT.

2 Scam. R., 472-473.

Appeal from Bureau.

A PETITION to enforce a mechanic's lien cannot be filed until the work is completed, or the time of payment has arrived.

Decree reversed.

Logan, for appellant.

Beaumont, for appellee.

Lea v. Vail.

Rider v. Alleyne.

Harris v. Jenks.

LEA v. VAIL.

2 SCAM. R., 473-474.

Appeal from the Municipal Court of Chicago.

1. AN attachment bond which has no seal attached thereto is a nullity.

2. An attachment bond is amendable. (a)

3. It is error, for an inferior court to refuse permission to amend an attachment bond, by adding the seals of the parties thereto.

Judgment reversed.

Cowles and Krum, for appellant.

G. T. M. Davis, and *S. G. Bailey*, for appellee.

(a) This decision is based upon Cooke's Statutes, 229, sec. 8.

RIDER v. ALLEYNE.

2 SCAM. R., 474-475.

Error to Madison.

IN actions *ex contractu* against two defendants, it is illegal to take judgment by default against both, when only one has been served with process. (a)

Judgment reversed.

Cowles and Krum, for plaintiffs.

(a) *S. P. Owen v. Bond*, Bre. R., 91; *Russell v. Hogan*, 1 SCAM. R., 552; *Ladd v. Edwards*, Bre. R., 189; *Kimmel v. Shultz*, *ibid.*, 128; *Hoxey v. Macoupin*, 2 SCAM. R., 36; *McConnel v. Swalles*, *ibid.*, 571; *Tolman v. Spaulding*, 8 SCAM. R., 14; *Frink v. Jones*, 4 *ibid.*, 170; *Wight v. Meredith*, 4 *ibid.*, 361; *Wight v. Hoffman*, *ibid.*, 362; *Brockman v. McDonald*, 16 *Ill. R.*, 112; *Swift v. Green*, 12 *ibid.*, 173.

HARRIS v. JENKS.

2 SCAM. R., 475-477.

Appeal from Warren.

1. ALL writs and process must run in the name of "the People of the State of Illinois." (a)

2. Where these words are omitted, an amendment is permissible.

3. Such amendment may be made, on appeal in the Circuit Court where the cause originated before a justice of the peace.

4. The words may be inserted in any part of the writ.

Harris v. Jenks.

Jones v. The People.

Campbell v. Humphries.

5. Every intendment will be made by the Supreme Court in support of process.

6. A justice of the peace has jurisdiction over an unliquidated account, where the amount is reduced by fair credits to a sum less than \$100. (b)

Judgment affirmed.

A. Williams, for appellant.

Browning, for appellee.

(a) *Vide*, also, Ferris v. Crow, 5 Gilm. R., 100; Scarritt v. Chapman, 11 Ill. R., 443; Curry v. Hinman, *ibid.*, 420; Donnelly v. The People, *ibid.*, 552.

(b) *Vide* Cooke's Stat., 637, sec. 18; decisions thereon similar to the text: Huginin v. Nichols, 1 Scam. R., 576; Harris v. Jenks, 2 *ibid.*, 476; Nichols v. Ruckells, 3 *ibid.*, 299. The contrary was held under the act of 1827: *Vide* Bre. R., 21, 153, 263, 293; 1 Scam. R., 23 and 163.

JONES v. THE PEOPLE.

2 Scam. R., 477-478.

Error to Johnson.

WHERE a justice of the peace is indicted for refusing to issue a *subpoena* for witnesses—the indictment should allege that he did so “*willfully and corruptly*,” in order to constitute the crime of malfeasance in office. (a)

Judgment reversed.

D. J. Baker, for plaintiff.

Olney, attorney-general, for defendants.

(a) *Vide* Cooke's Stat., 393, sec. 110.

CAMPBELL v. HUMPHRIES.

2 Scam. R., 478-480.

Appeal from McDonough.

1. THE payee of a promissory note cannot maintain an action against the maker, if he has assigned the instrument.

2. A plea in bar to an action by the payee v. the maker of a note, that the payee assigned the note to A, and A assigned to B, and B assigned to C, is a bar to the action.

3. A suit upon a note must be in the name of the legal holder of the paper.

4. *Seem*, if the payee has regained, legally, the possession of the note, he may erase the indorsements, and sue as payee. (a)

Judgment reversed.

C. Walker, for appellant.

(a) The same questions settled in Brinkley v. Going, Bre. R., 288; Kyle v. Thompson, 2 Scam. R., 432.

Harney v. Doe.

James v. Dunlap.

The People v. Fletcher.

HARNEY v. DOE.

2 SCAM. R., 480-481.

appeal from Morgan.

IN ejectment under the fictitious common law system, when the actual tenant appears, and enters into the consent rule, the plaintiff must exhibit a declaration against him before he can take a default. A declaration against the casual ejector is insufficient. (a)

Judgment reversed.

W. Thomas, for appellants.

McConnel, for appellee.

(a) S. P. Ayres v. Doe, *ex dem.* McConnel, 1 SCAM. R., 807.

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JAMES v. DUNLAP.

2 SCAM. R., 481-482.

Appeal from Morgan.

REPLEVIN—Defendant avowed under a writ of attachment issued against the plaintiff, and executed by the defendant, as sheriff of Morgan county, replication, that the defendant was not sheriff at the time of the issuing of the attachment, and making of the levy. On demurrer—the plea was held bad, upon the ground that it was a sufficient bar to show that the defendant was sheriff, when the levy was made.

Judgment affirmed.

McClure, for appellants.

Yates, for appellee.

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THE PEOPLE v. FLETCHER.

2 SCAM. R., 482-488.

Motion for a Mandamus.

1. A CLERK of the Circuit Court in receiving and filing a sheriff's bond, acts ministerially, and these acts may be consummated in vacation.

2. A sheriff has thirty days after notice of the receipt of his commission to execute and file his official bond.

3. The simple duty of the court, in a case where the sheriff elect has executed and filed in vacation his official bond, is to approve or reject the bond.

The People *v.* Fletcher.Van Winkle *v.* Beck.Emerson *v.* Clark.

4. Where a sheriff elect has performed all of the duties prescribed by law, in order to his induction into office, the Supreme Court will award a *mandamus* to compel the clerk to receive and file his bond, and administer to him the usual oath of office. (a)

*Mandamus awarded.**Peters*, for relator.*McConnel*, for respondent.(a) *Vide* Cooke's Stat., 1122, secs. 2 and 3.

 VAN WINKLE *v.* BECK.

2 Scam. R., 488-489.

Error to Fayette.

1. WHERE a suit is pending before a justice of the peace, and the parties voluntarily submit the cause to arbitration, they are bound by the award.

2. An appeal does not lie from the judgment of a justice, rendered upon the award of arbitrators, to whom the cause has been referred.

3. A cause pending before a justice may be submitted to arbitration, and upon the return of the award the justice may render a judgment thereon, which will be valid and binding upon the parties. (a)

*Judgment affirmed.**Fiske*, for plaintiff.(a) Cooke's Stat., 704, sec. 43: Hyatt *v.* Harman, 1 Gilm. R., 879.

 EMERSON *v.* CLARK.

2 Scam. R., 489-491.

Appeal from Scott.

1. An appeal from the Circuit to the Supreme Court, where the judgment is final, and amounts to the sum of \$20, exclusive of costs, or relates to a franchise or freehold, is a matter of right, and the Circuit Court can prescribe no other conditions than such as the statute imposes upon the appellant.

2. The settling of a bill of exceptions is a judicial act, and the court cannot delegate its authority.

3. If a bill of exceptions is correct, it is the duty of the judge to sign and seal it, without imposing conditions upon the party taking it.

4. A bill of exceptions which makes certain instruments parts of the bill, upon condition that the party excepting, or his counsel, will verify the documents by affidavit, is a nullity.

BROWNE, J.—This was an action of *trover* brought in the Circuit Court of Scott county, by George W. Clark against Joseph Emerson, to recover damages for the conversion of a certain quantity of wheat. Upon the issue the verdict and judgment was for the plaintiff in the

court below. The principal error complained of is the manner in which the bill of exceptions was made out.

It appears from the order of the court, that certain papers mentioned in the bill of exceptions to be copied therein, were not present in court, or on file.

The following order was made by the court below. "It is therefore ordered, that unless the defendant shall, within twenty days from this date, file with the clerk of this court said two papers, verified by affidavit of the defendant, or his counsel, to be the same two papers offered in evidence, and mentioned in the bill of exceptions, herein to be copied, the appeal ordered in this cause shall not be considered as granted, but said order granting said appeal shall become and be void."

"Appeals from the Circuit Courts to the Supreme Court shall be allowed in all cases, where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of twenty dollars," etc; "provided, such appeal be prayed for at the time of rendering the judgment or decree, and provided the party praying for such appeal shall, by himself, or agent, or attorney, give bond with sufficient security to be approved by the Circuit Court, and filed in the clerk's office of the Circuit Court, within the time limited by the court." The defendant below has complied with every requisition of the statute. The appeal, then, is complete. Nothing more, then, could be required of him. The appeal is absolute.

The law of Illinois in relation to bills of exceptions, is clothed in the following language: "If during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow the said exception, and to sign and seal the same, and the said exception shall thereupon become part of the record of such cause." The bill of exceptions, as ordered to be made out by the court, was a nullity.

It was the duty of the court to sign the bill of exceptions, if it was correct. If it did not truly state the case, the judge should refuse to sign it. It was not in the power of the court to delegate its authority. It is a judicial act. It then stands in this court, as if no exceptions had been taken to the opinion or instructions of the court below.

Judgment affirmed.

Lamborn, for appellant.

W. Brown, for appellee.

Hancock County v. Marsh.

Russell v. Martin.

HANCOCK COUNTY v. MARSH.

2 SCAM. R., 491-492.

Error to Hancock.

THE dismissal of a *suit* upon the hearing of an *appeal*, is no bar to a subsequent proceeding.

*Judgment affirmed.**A. Williams and Little*, for plaintiff.*C. Walker*, for defendant.

RUSSELL v. MARTIN.

2 SCAM. R., 492-495.

Appeal from Clinton.

1. CASE for slander.

2. Where the declaration contains several counts, and a demurrer was sustained thereto, leave given to amend and the amendment made instant, the defendant is not entitled to a continuance unless the amendment changed the cause of action or worked a surprise upon the party. (*a*)

3. In case by a female for slanderous words imputing want of chastity—the insertion of the words “sole and unmarried” as descriptive of the *status* of the plaintiff, and erasing the word “*adultery*” and inserting in lieu thereof the word “*fornication*” is not such a material amendment as to authorize a continuance of the cause.

4. Where issues are joined and the justice of the cause fairly presented, the Supreme Court will not reverse a judgment simply because a *frivolous* demurrer to a replication has not been technically disposed of.

5. Where a question is put to a witness and answered, in the face of an objection by the opposite party, the Supreme Court will not reverse the judgment for the illegality of the question, unless the bill of exceptions shows the answer of the witness to the question.

6. It is discretionary with the Circuit Court to permit a witness to be recalled after his examination is once closed.

*Judgment affirmed.**Bond*, for appellants.*Field*, for appellee.

(*a*) Scott v. Cromwell, Bre. R., 7; Hawks v. Lands, 8 Glim. R., 227; Illinois Marine and Fire Ins. Co. v. Marseilles Manufacturing Co., 1 *ibid.*, 286; Crane v. Graves, Bre. R., 87; Covell v. Marks, 1 Scam. R., 525; Rountree v. Stuart, Bre. R., 43; Webb v. Lasater, 4 Scam. R., 548; Miller v. Metzker, 16 Ill. R., 890; Ohio and Miss. Railroad Co. v. Palm, 18 *ibid.*, 22; Quartier v. University of St. Mary, *ibid.*, 800.

Davenport v. Gear.

Robinson v. Rowan.

DAVENPORT v. GEAR.

2 SCAM. R., 495-499.

Appeal from Jo Daviess.

ONE partner cannot sue his co-partner at law, unless the firm has been dissolved, a final balance struck and an express promise to pay is made by the debtor partner. (a)

*Judgment reversed.**Strong and Logan, for appellant.**G. T. M. Davis, Butterfield and Spring, for appellees.*

(a) S. P. Frink v. Ryan, 3 SCAM. R., 328; Bracken v. Kennedy, *ibid.*, 564; Chadsey v. Harrison, 11 ILL. R., 156; Blue v. Leathers, 15 ILL. R., 82; Caswell v. Cooper, 18 *ibid.*, 582.

ROBINSON v. ROWAN.

2 SCAM. R., 499-502.

Appeal from Gallatin.

1. The statute of 1827 required a grantee of land to record his deed within twelve months after its execution, and if not recorded within that period the deed should be void as against subsequent *bonâ fide* purchasers or mortgages, etc., unless the first grant is recorded before the second conveyance or incumbrance.
2. By the act of 1829, the time within which a deed was to be recorded was limited to six months after the execution thereof.
3. A *bonâ fide* purchaser, within the meaning of these acts, is one who pays a valuable consideration for the land, and receives his deed prior to the record of the first conveyance without notice of the latter.
4. If the second purchaser has actual notice of the prior deed, this is equivalent to record notice.
5. Where neither grantee puts his deed upon record within the time limited by law, the deed first recorded will hold the title.
6. The design of the recording laws was to convey notice to persons purchasing subsequent to the first purchase or incumbrance.
7. There is no distinction under the recording laws of Illinois between purchasers at private and public sales.
8. The recording law of 1833 making an unrecorded deed void as to "creditors," cannot have a retrospective operation.
9. A judgment lien only attaches to the interest which the debtor has in land at the time of its rendition. It does not create a lien upon lands which the debtor had conveyed to a stranger prior to its rendition, although the grantee failed to record his deed within the time limited by law.
10. Courts will not construe a statute retrospectively unless the language is plain and mandatory, nor even then if its effect is to divest rights of property. (a)

THIS was an ejectment by Robinson against Rowan for the recovery of a parcel of land. Both parties claimed title under John Bays, who was the owner in fee. The particulars of their respective claims of title were, that Bays, by deed of Dec. 11, 1832, conveyed to Rowan in fee, which deed was recorded Dec. 11, 1833. On September 10, 1833, one Curtis Hill recovered a judgment in the Circuit Court of Gallatin against Bays, and execution issued thereon, was levied upon the land in question and by virtue thereof a sale took place in satisfaction, Dec. 23, 1833. Robinson, who was the attorney of Hill, became the pur

chaser, and on March 14, 1836, received a sheriff's deed for the premises. At the time of sale, the sheriff notified Robinson of the deed to Rowan from Bays. On the trial, Robinson asked these instructions to the jury :

First, That any notice or knowledge of Rowan's title, by a purchaser at sheriff's sale, would not affect or invalidate his title, nor would any notice which the judgment creditor might have had, or his attorney at law.

Secondly, That the defendant's deed, not having been recorded before the rendition of the judgment under which the plaintiff claims title, is void, in law, as to said judgment and creditor thereof.

Which were refused, and Robinson excepted. A verdict and judgment were rendered for Rowan, and Robinson appealed, assigning for error the refusal of the court below to give the instructions aforesaid.

WILSON, C. J.—The correctness of the decision of the court, in refusing these instructions, depends upon the proper construction of the several acts of the legislature regulating the manner, and declaring the effect, of recording deeds and other writings. The act of 1827 requires all deeds, etc., for land, to be recorded within twelve months after their execution ; and if not recorded within that time, they shall be adjudged void against any *bonâ fide* subsequent purchaser or mortgagee, for valuable consideration, unless such deed, etc., shall be recorded before the recording of the deed, etc., under which the subsequent purchaser or mortgagee shall claim title. By an amendment to this act, in 1829, the time for recording deeds was limited to six months. Rowan became a purchaser, and received his deed from Bays under these acts, by the terms of which it will be perceived that *bonâ fide* subsequent purchasers and mortgagees only are protected against the operation of an unrecorded deed, and that only upon the first purchaser's failing to have his deed recorded prior to that of the subsequent purchaser. Under these acts, then, a deed is valid and binding, not only between the parties, but against all others, except a *bonâ fide* subsequent purchaser, etc., whose deed is first recorded. Robinson does not come within the exception specified. He is not a *bonâ fide* purchaser, nor was his deed recorded prior to Rowan's. A *bonâ fide* purchaser is one without notice of a prior claim or incumbrance. The object of the recording law was to furnish this notice, but in default of recording, the purposes of the law are effected by notice in any other manner. No difference exists between a purchaser at private sale, and one at a sheriff's sale.

It is insisted, however, that Hills acquired a lien upon the land in

controversy by virtue of his judgment against Bays, which was rendered after the conveyance to Rowan, and before it was recorded; and that the sheriff's sale to Robinson, under that judgment, vested in him the title thus acquired. In support of this position, the law making judgments a lien upon the land of the defendant, and the act of 1833, which declares unrecorded deeds void as to creditors, etc., are relied upon. Hill's judgment undoubtedly gave him a lien on the land owned by Bays at the time of its rendition, but it certainly gave him no lien upon the land owned by any other one; and, according to the law in force at the time Bays conveyed this land to Rowan, his deed divested him of all title, and vested it in Rowan; and, although unrecorded, it was obligatory not only between the parties, but equally so against the creditors of Bays, unless impeached upon the ground of fraud. Under this view of the case, the instructions asked for were properly refused.

The act of 1833, however, made an alteration in the effect and validity of unrecorded deeds, in relation to the creditors of the vendor. But does that act furnish the rule for the government of this case? Whatever may be its prospective operation, it would be alike in conflict with justice and the rules of interpretation, for this statute to relate back to December, 1832, at which time the title to the land sued for was, by virtue of the conveyance from Bays to the defendant, legally vested in Rowan, and thus, by construction, take from him his vested legal rights, in favor of one who had no legal or equitable claim. I have shown, that prior to 1833, and when Bays conveyed to the defendant, Rowan, the law did not require the deed to be recorded to protect the land against the claim of the creditors of the vendor. It is in reference to that law, then, that we are bound to suppose the parties made their contract; and that law, therefore, should furnish the rule by which their respective rights and obligations should be tested; and it is not by construction that the court will be warranted in the imposition of additional liabilities. The act of 1833 is a remedial law, designed for the purposes of justice.

The recording law of 1833 is not necessarily retrospective in its terms; and a court will never give to a law such an operation, unless compelled to do so by language so clear and explicit, as to admit of no other interpretation; neither the language of this statute, therefore, nor the purposes of justice, will warrant such a construction as to allow it a retrospective operation. It is a remedial statute, but to give it the construction contended for, by which liabilities and duties are imposed upon purchasers which were neither known to the law, nor contemplated by them when they contracted, would convert it into a

Robinson v. Rowan.

Greenwood v. Spiller.

penal one. It is only in the degree of injustice and hardship, that such a law differs from an *ex post facto* law, an evil of sufficient magnitude to be forbidden by the Constitution. As the court cannot, therefore, regard the title of the defendant, Rowan, to the land in question, as affected by the law of 1833, but is of opinion that its validity depends entirely upon the law in force at the time Rowan purchased the land from Bays, it necessarily follows, that the court decided correctly in refusing to give the instructions required, in reference either to the effect of the notice to the plaintiff, or to the judgment against the vendor of the defendant.

Judgment affirmed.

Gatewood, for appellant.

Logan and Eddy, for appellee.

(a) S. P. Bruce v. Schuyler, 4 Gilm. R., 279; Garrett v. Wiggins, 1 Scam. R., 386; Jones v. Bond, Bre. R., 224; Woodworth v. Paine, *ibid.*, 295; Thompson v. Alexander, 11 Ill. R., 55; Marsh v. Chesnut, 14 Ill. R., 227.



GREENWOOD v. SPILLER.

2 Scam. R., 502-505.

Error to Franklin.

1. THE proper judgment to be rendered in an action against an executor or administrator is to ascertain the claim, and award execution "to be paid in due course of administration." It is error to award execution against the lands, goods, and effects of the testator or intestate, in the hands of the executor or administrator, etc. (a)

2. Pedigree cannot be proved by the certificate of the probate judge.

3. Hearsay is inadmissible to prove pedigree, except in ancient cases, where no other proof is attainable.

4. The proper proof of pedigree is to call the relatives or intimate friends of the family of the deceased.

Judgment reversed.

Logan, for plaintiff.

Gatewood, for defendant.

(a) S. P. Burnap v. Dennis, 3 Scam. R., 433; McDowell v. Wight, 4 Scam. R., 403; Peck v. Stephens, 5 Gilm. R., 127; Powell v. Kettle, 1 Gilm. R., 491; Welch v. Wallace, 3 *ibid.*, 490; *vide* Green v. Grimshaw, 11 Ill. R., 391; Church v. Jewett, 1 Scam. R., 55; Bailey v. Campbell, *ibid.*, 118; Seiby v. Hutchinson, 4 Gilm. R., 319.

Swain v. Cawood.

Camden v. Robinson.

Collins v. Robinson.

SWAIN v. CAWOOD.

2 SCAM. R., 505-507.

Error to Lake.

1. A BILL of exceptions must set forth all of the evidence, to enable the Supreme Court to determine whether or not a new trial should be awarded, upon the sole ground that the verdict was contrary to the evidence.

2. In an action upon a promissory note, where the general issue is interposed, proof of a total or partial failure of consideration is inadmissible, the defendant should plead specially.

3. Where a note is given for work and labor, after the completion of the work, this is *prima facie* evidence that the payee performed his contract of service.

*Judgment affirmed.**Butterfield*, for plaintiffs.*Spring and Goodrich*, for defendant.

CAMDEN v. ROBINSON.

2 SCAM. R., 507-509.

Error to Hancock.

WHERE one of several plaintiffs dies before the institution of a suit upon a promissory note, the defendant can only avail himself of the fact by pleading in abatement.

*Judgment reversed.**Little and A. Williams*, for plaintiffs.*Ralston and McDougall*, for defendant.

COLLINS v. ROBINSON.

2 SCAM. R., 509-510.

Error to Morgan.

1. A SUBSEQUENT agreement making a contract payable in a particular county does not confer jurisdiction upon the Circuit Court of the county where the contract is made payable, to send its process to a foreign county.

2. The jurisdictional facts necessary to confer authority upon a Circuit Court to send its process to a foreign county must appear in the declaration. (a)

*Judgment affirmed.**McConnel and McDougall*, for plaintiff.*Jno. J. Hardin*, for defendant.

Evans v. Lohr.

Kinzie v. Penrose.

EVANS v. LOHR.

2 Scam. R., 511-515.

Appeal from Morgan.

1. A JUDGMENT can only be arrested for causes appearing upon the face of the record.

2. If a court misdirects a jury in point of law, or withholds proper instructions, the remedy of the party aggrieved is to except, or move for a new trial.

3. The Supreme Court will not investigate moot questions or abstract propositions of law.

4. A bill of exceptions should contain every fact necessary to show the materiality of the instructions asked and refused.

5. In an action upon a note, it is no defence to aver and prove that the plaintiff agreed to extend the time of payment in consideration that a stranger verbally, and without consideration, agreed to pay the plaintiff an increased rate of interest upon the note.

*Judgment affirmed.**McConnel and McDougall*, for appellant.*Jno. J. Hardin*, for appellee.

KINZIE v. PENROSE.

2 Scam. R., 515-522.

Appeal from Cook.

1. A conveyance of land upon condition that the grantee shall improve the property, is valid and will be enforced.

2. Such condition need not be expressed in the deed of conveyance, but may be established by a writing *aliunde*; *ex. gr.*, by the letter of the grantee to the grantor.

3. A verbal contract relating to land, or the improvement thereof, is not absolutely void.

4. The statute of frauds must be pleaded or relied upon in the answer in courts of equity.

5. Where a conveyance is conditional, and the condition is performed within the time limited, equity will not rescind the contract.

6. A party to a deed may show by parol, in a court of equity, a different consideration from the one recited therein, in cases of fraud, mistake, imposition or oppression.

7. Every general rule is subject to exceptions.

THE facts were that the complainant filed his bill in chancery in the Cook Circuit Court, alleging that, being the owner and proprietor of that part of the town of Chicago known as "Kinzie's Addition," he sold lot No. 10, in block No. 12, to the defendant, on the 9th of March, 1833, for \$42; and also, at the same time deeded to defendant lot No. 11, in the same block. That the \$42 mentioned as the consideration money in the deed was paid for lot No. 10, and that lot No. 11 was deeded to the defendant upon an agreement be-

tween the parties that the defendant should before the first day of August, 1834, erect, build, and finish a good dwelling-house upon the said lot No. 11. That the motive which induced the complainant to deed the said lot to defendant, and the only consideration for such conveyance, was the agreement of the defendant to erect and complete the said building; the said complainant expecting that the residue of his lots in the said addition would be greatly enhanced in value by the erection and completion of said building. That the deed of conveyance of the two lots, was duly acknowledged, and recorded in the recorder's office of Cook county, a certified copy of which is exhibited with the bill; that the complainant placed great confidence in the defendant; that the agreement to build, which was the sole and only consideration for which said lot No. 11 was conveyed, was by parol; and that the defendant combining, etc., to defraud the complainant shortly after the making and recording of the said deed, removed himself and family from this State, and beyond the jurisdiction of any of the courts of law of this State; and that he has neglected, failed, and refused to build upon and improve said lot No. 11, according to his promise and agreement. The bill further alleges that the agreement of the said defendant by which he obtained the deed for said lot No. 11, was made with the fraudulent intent to deceive and defraud the complainant out of the said lot, and for no other purpose whatever, as the said complainant believes, and so charges the fact to be.

The bill also avers that sometime in the fall of the year 1834, the defendant was informed that the complainant was about to commence and prosecute a suit in chancery for the recovery of the said lot No. 11, because of the failure of the defendant to build upon and improve said lot, according to the agreement; and that thereupon the said defendant wrote letters to Col. T. J. V. Owen, and Col. R. J. Hamilton, acknowledging that he had forfeited the said lot by his non-compliance with the agreement, and also empowered, authorized and requested either of said gentlemen to settle the same with the complainant, without suit or further difficulty; and at the same time declared his willingness to reconvey the lot to complainant, or pay a valuable consideration therefor, and keep it; that at the request of Col. Owen, the complainant delayed bringing suit until it could be ascertained whether the defendant would pay the price set upon said lot by the complainant, and that during the pendency of the said negotiation, the defendant wrote to the complainant's brother, John H. Kinzie, from Mackinaw, on the 6th of March, 1835, repeating his willingness to give up the lot to the complainant, but declaring

Kinzie v. Penrose.

that he preferred purchasing it. The last mentioned letter is exhibited with the bill. The bill further avers that the defendant was informed of the price of said lot, and requested to forward the price, or a deed of release of the same to the complainant, as soon as it could be done. That afterward, in the month of July, 1835, the defendant visited Chicago, and remained some days, and again left, without paying the complainant anything for said lot; but refused to make payment, and refused to reconvey the said lot to the complainant, or to arrange the matter in any way whatever.

The bill concludes with a prayer of summons to the defendant, and that he be required to answer all the matters and things therein, upon oath, and prays a decree requiring the defendant to reconvey lot No. 11, etc.

The defendant answered, denying the fraud, etc., and demurring to the general equities of the bill. The complainant thereupon amended his bill, alleging that the agreement between complainant and defendant was, that, in consideration of the deeding of said lot No. 11, to defendant, by complainant, the defendant would build upon and improve said lot; and that if he failed to erect and complete the dwelling-house upon said lot, before the 1st of August, 1834, he would reconvey the said lot, by deed of release, to the complainant, at any time after that period. The complainant avers that the agreement to improve said lot was the sole and only consideration for the deeding of said lot to defendant, and states the neglect and refusal of the defendant to perform, according to said agreement, or to reconvey to the complainant; and concludes with a prayer as in the original bill.

To this amended bill the defendant answered and demurred as before.

The letter from Penrose to Kinzie referred to in the bill was in these words, viz.:

“DEAR SIR,

“MACKINAW, *March 6th*, 1835.

“I heard last fall, by accident, that your brother Robert was about entering a suit in chancery for the recovery of the lot presented me on condition of building. I have written to Colonel Owen to have this affair settled; also to Colonel Hamilton, and have not received a line from either. I informed them I wished to settle it without a suit, and would do so, by giving up the lot, or any other mode which would prove satisfactory to him (your brother). I would prefer purchasing if I can. You will greatly oblige me, my dear sir, if you will write me on the subject.

“I am, very respectfully, your obedient servant,

(Signed,)

“JAS. W. PENROSE.”

Kinzie v. Penrose.

The complainant replied to the answer, and joined in the demurrer. The court below dismissed the bill. The complainant appealed.

Original opinion of

SMITH, J.—We think the demurrer ought not to have been sustained.

The consideration upon which the lot No. 11 was conveyed, sufficiently appears by the exhibit of the letter of Penrose, the appellee, to have been the one stated in the bill. The letter is explicit that the lot was presented or transferred by conveyance, on the express condition of building.

There can be no question that it is competent for the appellant to show a different consideration than the one stated in the deed, as between the parties to it. The true consideration is admitted, and therefore it would be but equitable that the appellee should perform his part of the real original contract between the parties.

If it be objected that this was a parol contract concerning the sale of lands, and consequently within the statute of frauds, it may be replied, if it be so considered, that the statute has not been pleaded, and consequently, as the contract is not sought to be avoided under the statute, the court will not notice it.

We think there is sufficient equity in the bill.

Decree reversed.

The court granted a rehearing upon the petition of the defendant, and this additional opinion was given by

SMITH, J.—A rehearing having been had in this case, we proceed to reaffirm the opinion heretofore expressed in the cause, and to state more fully the reasons for still entertaining the conclusions to which we came on the first hearing; and also to answer the objections urged by counsel against a reversal of the judgment of the Circuit Court.

It has been strenuously insisted on, that the complainant cannot contradict his deed, nor enter into proof of any other consideration than that expressed in the deed, for that would be contrary to the deed.

As a general rule, the proposition is admitted; but there are exceptions to all general rules. To this general rule of evidence, which prevails in equity as well as at law, there is admitted to be several exceptions, and that these exceptions prevail in cases of fraud, mistake, imposition, or oppression; and in cases where deeds have been entered into upon secret trusts between the parties. A very

strong case of an exception to the general rule, is to be found in Washington's Virginia Reports of cases decided in the Court of Appeals in that State, in which parol evidence was admitted to prove that an absolute deed was intended to operate as a mortgage. The court, in that case, say that, "It is objected in this case, that here is an absolute deed, and that no parol proof is to be admitted to contradict it. This is a question important in its consequences, but w^h in its full latitude, cannot be admitted either way, as the general rule; that is to say, we cannot determine that it is not to be admitted in any case, or that it is to be admitted in all cases. To say it is to be admitted in no case, would be to overturn all the decisions which relief has been granted against deeds, upon the grounds of fraud, mistake, oppression, or imposition; or that they were made upon secret trust between the parties. In all which cases the fact, which is the ground of relief, is established by the testimony of witnesses. Of the first class, the books abound with instances, which are stated in the case of Lord Irnham v. Child. Of the latter, there are also many. The case of Gascoigne v. Tewing is a strong one. A purchased in the name of B, to whom the conveyance was made; A was admitted to prove that he paid the purchase-money, so as to make it a resulting trust to himself. So in the case of Hill *et ux.* v. Wiggett, a surrender of a *feme covert*, and the admission upon the roll was of a moiety only of her estate, yet an entry on the steward's book, and parol proof by the foreman of the jury, were admitted as good evidence to prove she surrendered the whole."

Another case is referred to, supposed to militate against the distinction contended for, but it is remarked, "The general principles of the case prove that parol evidence, where there is a deed, is not to be admitted in all cases, nor refused in all; every case must depend upon its own circumstances. In that just noticed, the chancellor admitted the proofs to be read, to discover if there were grounds for relief, on a new head of equity, and on the testimony, determined there were not."

Parol proof that a deed, absolute in its terms, is in fact a mortgage, is admissible.

The cases cited by the counsel for the defendant in error, from 1 Johnson's Chancery Reports, do not militate against the principles of exception to the rule contended for, nor, it is thought, deny the justice of the rule. In that most relied on, of Stevens v. Cooper, the chancellor remarks, "The general rule is certainly not to be questioned or disturbed. It ought not to be a subject of discussion. It is as well grounded in reason and policy, as it is in authority; nor does

Kinzie v. Penrose.

Doe ex dem. McConnel v. Johnson.

this case come within any exception admitted here to the operation of the rule."

If no relief should be afforded the complainant, it is most evident that the defendant will receive valuable property, without the performance of a condition admitted to have been one of the conditions of the conveyance of the land, and in violation of an express stipulation between the parties.

The complainant anticipated an increase to the value of the residue of his property adjacent to the lot conveyed, by the agreement to build; and supposed it would have been observed by the defendant, in good faith. The court see no just reason why the latter should be absolved from his engagement, and also retain the lot, without giving any compensation therefor. The admission of the parol evidence shows only that there was an additional consideration for the conveyance, which existed at the time, and must naturally be supposed to enter into the inducements for the sale of the ground. Hence we are not satisfied that the parol proof should be excluded, but believe it ought to be admitted, on the ground of preventing the perpetration of an imposition, an act of oppression on the complainant.

The objection, then, that the condition is not by deed under seal, but resting in parol, is met by the reasons stated for the admissibility of such proof.

The other ground assumed by counsel, that a court of equity will never lend its aid to divest an estate, for the breach of a condition subsequent, is thought to have no application to the case before us. There is not conceived to be any condition subsequent.

It was a coexisting condition at the time of the execution of the deed, resting in parol, but not inserted in the deed, because, probably, of the mutual confidence between the parties at the time, that it would be consummated in good faith.

Decree reversed, and cause remanded.

Morris and Grant, for appellant.

Butterfield and Collins, for appellee.



DOE ex dem. McCONNEL v. JOHNSON.

2 SCAM. R., 522-523.

Error to Morgan.

1. In ejectment no person should be made a lessor, unless he had, at the commencement of the suit, a subsisting title to the premises.

Doe *ex dem.* McConnel v. Johnson.

Morris v. Grover.

Stone v. Manning.

2. Where it appears upon the trial, that a lessor has no such interest, the count, upon his demise, will on motion be stricken out.

3. A party is not entitled to a continuance where it appears of record or upon the files that he has not used diligence to obtain the testimony of a material absent witness.

4. In ejectment where both parties claim title from a common source, they are not bound to go behind that source in proving title.

5. A deed properly acknowledged is evidence of its execution.

Judgment affirmed.

McConnel, pro se.

W. Thomas, for defendant.



MORRIS v. GROVER.

2 Scam. R., 528-530.

Error to Hancock.

WHERE the Supreme Court have once, upon a fair hearing, refused to award a *supersedeas*, a second application will not be entertained.

Motion denied.

Morris, pro se.



STONE v. MANNING.

2 Scam. R., 530-535.

Error to Madison.

1. Equity will not entertain a bill, where the complainant has an adequate remedy at law. (a)

2. A conveyance will not be set aside in equity as fraudulent, at the suit of a creditor, unless his debt has been ascertained by judgment at law, and he has used diligence to obtain satisfaction by execution.

SMITH, J.—It is unnecessary in this case to do more than briefly state some of the facts disclosed in the complainant's bill, to show that he is not entitled to the relief sought.

It appears that a copartnership originally existed between the complainant and Stone & Glover; the complainant being merely a nominal partner, and receiving an annual salary of \$1,500. That this copartnership was dissolved, and the effects of the firm carried and transferred to a new firm, under the name of Stone & Co., composed of Stone & Glover, and that the complainant took from Stone & Glover a bond of indemnity, to save him harmless against the debts due by the old firm. It also appears that Stone & Glover have assigned a part of their copartnership property to the defendant, Griggs, to pay

certain debts. The complainant alleges that this assignment was fraudulent.

The complainant now seeks to have the effects of the new firm applied to the payment of his claim alleged to have originated by his payment of debts of the old firm, which he alleges he has paid, and for his expenses connected with his efforts to make settlement and payment of the debts alleged to have been extinguished by him; such application of the effects of the new firm to be made to the payment of his claim, to the exclusion of other creditors of the firm of Stone & Co., for whose benefit the assignment made is intended, but which complainant alleges is fraudulent and void as to him.

In the consideration of the case, it will be apparent from the complainant's statement, that he has no preference of payment, in equity, for the moneys he may have voluntarily paid on account of his liabilities under the old firm, out of the property of the new firm. Against the new firm he can have no possible claim, on account of previous transactions of the old firm. Even the effects of the old firm were merged in the new, and on these he has no lien whatever. If he has paid debts of the old firm, he is no more than a simple contract creditor of Stone & Glover, having paid moneys on their account, and to their use, and for which his remedy at law is ample and perfect. But it is still more clear, that he must first establish his claim against Stone & Glover, arising out of the alleged payment, by a judgment at law, and have made efforts to obtain satisfaction by execution, before he could ask the aid of a court of equity, to interfere and set aside conveyances of the debtors alleged to be fraudulent, to secure the payment of other creditors' claims.

There are two classes of cases where a plaintiff is permitted to come into this court for relief, after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In the one case, the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on execution; in the other case, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant, which cannot be reached by execution at law. In the latter case, his right to relief here, depends upon the fact of his having exhausted his legal remedies, without being able to obtain satisfaction of his judgment. In the first case, the plaintiff may come into this court for relief immediately after he has obtained a lien on the property, by the issuing of an execution to the sheriff of the county where the same is situated, and the obstruction being removed, he may proceed to enforce

Stone v. Manning.

the execution, by a sale of the property, although an actual levy is probably necessary to enable him to hold the property against other execution creditors, or *bonâ fide* purchasers.

The same principles are recognized in Johnson's Chancery Reports, in numerous English and American cases to which they refer.

The present is not a case of copartners asking to have an account taken of the copartnership effects and debts, and a settlement decreed between them, but of a person who was only a nominal partner in one firm, asking to have the property of a new and different firm applied to the payment of claims alleged to have grown out of previous liabilities of the old firm, without having first established any legal claim against the new firm, or indeed doing so against the partners, other than himself, of the old firm.

But it is most evident that the complainant is not without entire and adequate relief at law.

He has a perfect remedy on the indemnity bond, and although one of the obligors may reside out of the State, still he may proceed against those who reside here, and against those who may reside elsewhere, in the places of their residence, or he may proceed, under the attachment law, against such as are non-residents.

Decree reversed and bill dismissed.

Butterfield, Cowles and Krum, for plaintiffs.

Logan and Martin, for defendant.

(a) S. P. Bates v. Bagley, Bre. R., 60; Reynolds v. Mitchell, *ibid.*, 135; Richardson v. Prevo, *ibid.*, 167; Greenup v. Brown, *ibid.*, 198; Greenup v. Woodworth, *ibid.*, 194; Duncan v. Burr, *ibid.*, 215; Beaird v. Forman, *ibid.*, 303; Bustard v. Morrison, 1 Scam. R., 236; Elston v. Blanchard, 2 Scam. R., 420; Robinson v. Chesseldine, 4 *ibid.*, 333; State Bank v. Stanton, 2 Gilm. R., 353.

The exception to this rule is, that the complainant had no knowledge of his defence until after the rendition of the judgment at law: Hubbard v. Hobson, Bre. R., 150; Abrams v. Camp, 3 Scam. R., 290.

Or was prevented by fraud, accident, or mistake from making his defence at law; Nelson v. Rockwell, 14 Ill. R., 376; Propst v. Meadows, 13 *ibid.*, 157.

But where the defence is made at law and overruled, the fact that the complainant has discovered new evidence to sustain his defence, is no ground for the interposition of a court of equity: Armstrong v. Caldwell, 2 Scam. R., 418.

And where the complainant has been guilty of negligence in a court of law, he can have no relief in equity: Abrams v. Camp, 3 Scam. R., 290.

Again, where the complainant has an election to defend at law, or in equity, and elects the former forum, he is concluded by the judgment at law: Abrams v. Camp, 3 Scam. R., 291.

Where a defence is purely cognizable at law, but a discovery becomes necessary on account of a failure of proof at law, when the bill for discovery and relief is filed, a court of equity will retain the bill and do complete justice: Martin v. Dryden, 1 Gilm. R., 210.

Another exception is in cases where the vendor seeks to enforce his lien in equity: Andrews v. Sullivan, 2 Gilm. R., 332.

Eldridge v. Huntington.

Hunter v. Sherman.

ELDRIDGE v. HUNTINGTON.

2 SCAM. R., 535-539.

Error to Cook.

1. A JUDGMENT of *nonsuit* is no bar to a second action for the same cause.

2. Where a jury is waived and a cause tried by the court, the finding will not be disturbed unless the reasons are *strong and urgent*.

3. A new trial will not be granted because one of the witnesses was security for costs, unless the objection was made upon the trial.

*Judgment affirmed.**Spring and Goodrich*, for plaintiffs.*Butterfield and Huntington*, for defendant.

HUNTER v. SHERMAN.

2 SCAM. R., 539-545.

Error to the Municipal Court of Chicago.

1. The authority of a superior court of general jurisdiction will be presumed.

2. The Municipal Court of Chicago was a superior court of general jurisdiction.

3. In debt, upon a replevin bond, the declaration need not aver,

1. The issue of a *retorno habendo*.

2. That the plaintiff was sheriff.

3. That the bond was taken in a replevin cause.

4. That the goods were replevied.

5. What the interest of the defendant in replevin was.

6. That the plaintiff had sustained special damage.

7. That the replevin suit was instituted, etc.

Where the bond is set out all of these matters will be implied. The objections are purely technical and cured by the statute of jeofails.

4. A judgment against one of several defendants where the others have not been served with process, is regular.

5. In debt, on a replevin bond, where the judgment is for damages only, and they exceed the *ad damnum* of the declaration, and the court below after writ of error brought, permit the excess to be remitted, and the formal judgment for the debt to be entered up, and the amended record is returned to the Supreme Court on writ of certiorari, the judgment will be affirmed.

THE condition of the bond was in these words:

"That whereas, the above bounden Abraham A. Markle is about to sue out a writ of replevin from the office of the clerk of the Circuit Court of Cook county, Illinois, to replevy certain goods and chattels, to wit: ten beds, with straw beds and bedsteads, and bedding. Now, if said A. A. Markle shall prosecute his said suit to effect, and without delay, and make return of the said goods and chattels, if return thereof shall be awarded, and shall save and keep harmless said Silas W. Sherman, in replevying said goods and chattels, then this obligation to be void," etc.

The defendant in error instituted a suit on said bond in the Municipal Court of the city of Chicago, and alleged the following breaches, to wit:

In the first count:

“And the said plaintiff in fact avers, that said Markle, though often requested, did not return the said goods and chattels, although a return thereof was awarded to said Hubbard and Jamison, by the judgment and order of said Cook Circuit Court, at the fall term thereof, in the year 1836, in the said suit of replevin, of the said Markle against the said Hubbard and Jamison, for the recovery of the said goods and chattels above specified; and the said plaintiff avers it was the same suit referred to in the condition of the said writing obligatory.”

In the second count:

“And the said plaintiff saith, that afterward, to wit, on the — day of October, in the year 1836, at the fall term of said court, the said Hubbard and Jamison, in said suit or action of replevin, then and there obtained a judgment in said Cook Circuit Court, against the said Markle, for a return of the said goods and chattels, and also for the costs by them in that behalf expended; yet the said Markle did not, nor would, return the said goods and chattels, although often requested, to said Hubbard and Jamison; whereby an action accrued to the said plaintiff, to have and demand of and from the said defendants, the above sum of money demanded, for the use of said Hubbard and Jamison, according to the statute in such case made and provided, and according to the tenor and effect of said writing obligatory.”

The breach in the third count is substantially like that in the second.

The fourth count is on the bond, without setting out any condition, and the breach alleged is the non-payment of the four hundred dollars.

The fifth count sets forth the bond in substance, and the condition *verbatim*, and concludes as follows:

“And the said plaintiff avers, that the defendant Markle, although often requested, did not, nor would, return the said goods and chattels, although a return thereof was awarded by the judgment of the said Cook Circuit Court, at the October term thereof, holden in Chicago, in the said county of Cook, in the said suit of replevin, of the said Markle, against the said Hubbard and Jamison, for the recovery of the said goods and chattels, as will more fully appear by the record in said suit, an attested copy whereof is now here to the court shown.”

Process was served on Hunter only, against whom judgment was rendered by default, for \$399 06, in damages, at the July term, 1837. The cause was brought to this court by writ of error.

After the writ of error had been sued out in this case, the defendant in error, the plaintiff in the court below, gave notice to the defendant in that court, the plaintiff in error here, that he should apply at the next term of the court below, to wit, the November term, 1837, to have the record amended so as to conform to the action, and by entering a *remittitur* of all the damages exceeding \$300, the amount laid in the declaration. At said term of the court, the Hon. Thomas Ford presiding, the record was thus amended, and by virtue of a writ of *certiorari*, a new transcript certified to this court. The defendant objected to these proceedings.

SMITH, J.—This was an action on a replevin bond, given to the defendant in error, as sheriff. Judgment was rendered in the late Municipal Court of the city of Chicago, by default, against Hunter, who was alone served with process, the other defendant not having been found. Numerous errors have been assigned, all of which are considered untenable.

It is first objected, that the Municipal Court had no jurisdiction of the cause. This question has been fully investigated, and was settled at the last term, in the case of *Beaubien v. Brinckerhoff*; and has been again decided at this term, it being held that the late Municipal Court of the city of Chicago, being a superior court of general jurisdiction, it will be presumed to have jurisdiction until the contrary is made to appear. No exception having been taken to the jurisdiction in the court below, the jurisdiction must be presumed. The exception to the declaration, for the want of an averment that a writ of *retorno habendo* had been awarded by the court, on the entry of the judgment in the court, in favor of the defendants, in the action of replevin, is not well taken. There are five counts in the declaration, four of which aver, that by the consideration and judgment of the court, in which the action of replevin was determined, that return of the goods was ordered and adjudged, at the October term of the Cook Circuit Court, 1836, to the defendants in the action of replevin; and that the defendant in error refused and neglected to return the goods according to such order and adjudication; and the last count specially refers to the record of the court, as evidence of the truth of the averment that return of said goods was ordered and adjudged, and makes profert of such record.

It is a sufficient answer to the objection, to say, that the averment is in language full as broad as the condition of the bond; and no necessity is perceived for the assignment of a breach, in broader terms than the condition of the bond, which the parties had chosen to adopt. To require more, would seem to be a useless act, and one the

Hunter v. Sherman.

Savage v. Berry.

rules of pleading do not seem to require. We have looked into precedents of declarations in similar cases, and find the averment has not only been omitted in the forms, but has been held to be unnecessary.

It has also been held, that in this action the breach need not be formally assigned, and the plaintiff will be entitled to recover if a sufficient breach otherwise appear. Where the condition is to prosecute the suit with effect, and without delay, a breach in those words would suffice, and proof of two years' delay would suffice, without proving a judgment of *non pros*. The issuing of a writ of *retorno habendo* is sometimes stated, but is unnecessary.

The numerous other objections assigned as error, are purely technical in their nature, most of which would be cured by the statute of jeofails, did they all exist; but many are not perceived to be in the record. The rendering a judgment against one, when the other is not served with process, is distinctly authorized by the practice act; and without enumerating all the causes here alluded to, it is sufficient to say that there appears to be no ground on which to sustain them. The last error to be considered, is as to the form of the rendition of the judgment, being for damages, when the action is in debt. This supposed error has been obviated by the amended record, sent up by virtue of the writ of *certiorari*, by which it appears that the late Municipal Court of the city of Chicago, since the filing of the original record in this court, amended the judgment below so as entirely to remove the objection, which might otherwise have been fatal. Upon the whole case, we perceive no sufficient error to the prejudice of the plaintiff in error, and accordingly affirm the judgment, with costs.

Judgment affirmed.

Ryan and Turney, for plaintiff.

Morris and Scammon, for defendant.



SAVAGE v. BERRY.

2 Scam. R., 545-548.

Error to Morgan.

1. WHERE a note was made by A and B, Aug. 12, 1834, for \$175, and payable to C in April, one thousand eighteen hundred and thirty-six, when the intention of the parties was to make it payable in April, 1836, and C assigned the note to D, and D to E; and the latter sued at law, and failed to recover because of the mistake, and A and B refused to correct the mistake. *Held*, on a bill filed by E to reform the instrument, that equity would relieve.

Savage v. Berry.

Mills v. Brown.

2. Courts of equity have power to correct mistakes in written instruments.

3. When equity once obtains jurisdiction they will retain it until complete justice is done to the complainant.

4. No formal order taking a bill *pro confesso* is essential, if the record otherwise shows a default.

5. A reference to a master is unnecessary where a decree is based upon a note for the payment of money.

Decree affirmed.

Lamborn and Berdan, for plaintiffs.

Yates, for defendant.

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MILLS v. BROWN.

2 SCAM. R., 548-558.

Appeal from St. Clair.

1. A demurrer in equity admits only such facts as are well pleaded. It cannot have the effect of supplying substantial omissions, or cure a defective statement of title.
2. Where the legislature, on March 2, 1819, granted to A the right to establish, operate and maintain a ferry across the river Mississippi and land passengers and property upon such real estate as "*may* belong to him," provided he established his ferry within 18 months after the passage of the act. It was *held*;
 1. That the word *may* was *imperative*.
 2. That the grant extended only to such lands as A owned at the time of the passage of the act; but,
 3. If construed to extend to subsequent acquisitions, still the grant must be confined to such lands as the grantee of the franchise acquired title to within the time limited for putting the ferry in operation; and,
 4. Inasmuch as the bill failed to show the date of such new acquisitions, it was defective. (*a*)

THE facts sufficiently appear in the opinion of

SMITH, J.—It is discovered, upon an examination of the bill in this cause, that there is a serious defect in the statement of the complainants' title to the land, which materially affects the claim for the relief sought by them.

The act of the General Assembly of the State of Illinois, of the 2d of March, 1819, under which the complainants derive their title to the ferry and ferry privileges, described in the bill, as the assignees of Samuel Wiggins, the grantee named in the act, authorized the establishment of such ferry "on the waters of the Mississippi, near the town of Illinois, in this State," and "the running of the same from lands at said place, that may belong to him" (Wiggins); and the act further provided, that "Wiggins, his heirs, or assigns, should have the ferry in actual operation within eighteen months from and after the passage of the act."

The time within which Wiggins was to establish the ferry, and have it in actual operation, and by which the grant was to be inoperative, in case it was not established and in operation by that period, expired

on the 2d day of September, 1820. In the description of the land, and the mode and time of acquisition, the bill recites that Wiggins became the purchaser thereof, from Julie Jarrot, by deed of the 13th day of July, 1822, and that Wiggins, by deed of the first day of August, 1831, conveyed the same lands to a portion of the complainants, and to the ancestors of others of the complainants, of whom they are the legal representatives.

It is further recited in the bill, that a piece of said tract of land, lying on the Mississippi, near the centre of the tract, was claimed by one James Piggot, which claim was recognized by government, and a patent issued therefor, and that Wiggins acquired this piece several years before the date of the deed from Julie Jarrot to him; and first established his ferry on this piece, then being the owner thereof, under Piggot's legal representatives, which piece of land is included in the large tract, and was patented by the United States to John McKnight and Thomas Brady, in 1816; and was conveyed by them to Wiggins, by deed; copies of which papers and deed are said to be exhibited with the bill. This is the entire description in the bill of the inception of title to the lands by Wiggins. With the bill, no exhibits are, however, transcribed into the record, and we are consequently uninformed as to the contents or character of the conveyance from McKnight and Brady to Wiggins, and from Piggot's legal representatives, either in point of date, or description of land. The act of 1819 declares, that the ferry shall be run from lands at the place named in the act, "that may belong to him" (Wiggins).

The question here, in construing the first section of the act of 1819, naturally arises, Did the grant to Wiggins require that he should be the owner of the land at the passage of the act, or of such as he might subsequently purchase, before the period of the forfeiture of the grant? If the word "may," as understood in legal parlance, be rendered *shall*, it is apparent that Wiggins, by the facts disclosed by the complainants, in their bill, had no land at the place designated in the law of 1819, at the time of the passage thereof; and consequently he had no estate in the lands upon which the grant could operate; and the act was necessarily nugatory in its character, and was altogether inoperative in its effect.

On the other hand, if the grant be construed to operate on lands which Wiggins might acquire subsequently to the passage of the act, and before the time limited for the commencement of the ferry, it is equally clear, that the acquisition of the lands, by Wiggins, through the purchase of Julie Jarrot, was upward of one year and ten months after the time limited for the erection of the ferry, and consequently

the grant could not attach, or act on the lands thus acquired. As to the period of acquisition of the piece in the centre of the tract, represented to be a portion of the tract acquired from Jarrot, nothing is disclosed in the bill, which affords any certainty as to time; the omission to transcribe into the record, the exhibits referred to in the bill, precludes the possibility of learning when the title was acquired. The allegation in the bill, that Wiggins acquired the title to this portion of the land, several years before the date of the deed from Julie Jarrot, is so manifestly uncertain, that no evidence is afforded, by the statement, that the title was acquired before the 2d day of September, 1820.

The vague and indefinite character of the allegations, affords, then, no evidence that Wiggins was, at any time before the 2d of September, 1820, the owner of the lands near the town of Illinois, in the State of Illinois, contemplated in the act of 1819, and from which the ferry was to be put in operation. It may be said the demurrer admits all the allegations of the bill to be true, and that, therefore, the complainant's title to the land cannot be questioned. It is certainly true, the demurrer admits all that is well stated or pleaded, but it surely cannot supply defects in substance, or cure a defective title, nor yet establish one defectively set forth. It is too obvious to doubt that the title acquired in 1822, could not even aid the acquisition of the privileges conferred by the grant, much less be the foundation on which the grant was to operate, and vest the privileges named in the law, because of the posterior period of its inception; and equally so is the effect following from the want of the clear ascertainment of the title to the other portion of the land, on which it is alleged the ferry was first established.

The conclusion seems, then, very certain, that Wiggins was not the owner of any lands, within the time required by the act of 1819 to be possessed by him, upon which the grant could operate; and upon this ground alone the injunction might have been dissolved, and the bill dismissed.

Other questions of grave import, involving the constitutional character of laws connected with the case, have been raised, and elaborately and ably discussed, upon which it does not become necessary for this court to express an opinion, in order to the decision of the cause. It would, perhaps, be injudicious to express an opinion on these points, at this time, when it is not absolutely necessary; but more especially so, as the questions raised involve an inquiry into the extent and rightful exercise of legislative action by the General Assembly of this State, which it is supposed may arise, in at

Mills v. Brown.

least another cause now pending in this court, between the same parties.

I am of opinion, for the reasons given, that the judgment should be affirmed, with costs.

WILSON, C. J., LOCKWOOD, and BROWNE, delivered this separate opinion :

We concur in the opinion that the judgment of the Circuit Court must be affirmed, on the ground that the bill does not set out, with clearness and certainty, that Samuel Wiggins owned any land on the waters of the Mississippi River, near the town of Illinois, on the 2d of March, 1819, or within eighteen months thereafter, on which the grant of the legislature could operate; and because it does not appear, with certainty, that Samuel Wiggins owned any land on the Mississippi River, on the 6th of February, 1821, to which the ferry, before that time established by said Wiggins, could be removed, in pursuance of the act passed on the 6th of February, 1821.

Decree affirmed.

Gamble, Logan, and Shields, for appellants.

L. Trumbull and Butterfield, for appellees.

(a) This case again came before the court upon a different state of facts in 8 Scam. R., 51, and in 2 Gilm. R., 197; and was carried to the Supreme Court of the United States, the decision of which latter court is reported in 8 How. R., 569.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS.

IN FEBRUARY TERM, 1841, AT SPRINGFIELD.

PRESENT:

HON. WILLIAM WILSON, Chief Justice.

HON. SAMUEL D. LOCKWOOD,

HON. THEOPHILUS W. SMITH,

HON. THOMAS C. BROWNE,

HON. SIDNEY BREESE,

HON. THOMAS FORD,

HON. WALTER B. SCATES,

HON. SAMUEL H. TREAT,

} ASSOCIATE JUSTICES.

DUNCAN v. McAFFEE.

2 SCAM. R., 559-560.

Error to Fayette.

1. A petition and summons will lie upon a note under seal.
2. Such a note is properly described in the petition as a bond.
3. Where the note was signed "J. M. Duncan," he is properly described in the petition as "J. M. Duncan, *alias* James M. Duncan."

Judgment affirmed.

Forman, for plaintiff.

Peters and *Greathouse*, for defendant.

NOTE.—Judge DOUGLAS did not take his seat until the last day of this term.

 Raplee v. Morgan.

RAPLEE v. MORGAN.

2 Scam. R., 561-564.

Appeal from Scott.

1. A judgment and the proceedings thereunder are binding upon parties and privies.
2. In an action by the assignee of a note against the assignor, in order to establish diligence by suit against the maker, an execution issued against the maker is admissible without producing the judgment upon which it issued.
3. Where the assignee of a note within three days after the maturity thereof sues the maker before a justice of the peace, recovers judgment in due course, issues an execution thereon, which is in 87 days thereafter returned *nulla bona*, and thereupon files a transcript of the judgment in the Circuit Court, and causes an execution to be issued to the sheriff, which is also returned *nulla bona*, this constitutes due diligence and fixes the liability of the assignor. (a)
4. A return of *nulla bona* upon an execution against the maker, is evidence of his insolvency.
5. The admission of the assignor as to the insolvency of the maker of a note is admissible as evidence in an action by the assignee of a note against the assignor.
6. Parol evidence is admissible in such an action to prove the insolvency of the maker.
7. The purchase of a note at a discount greater than the legal rate of interest, in the fair course of trade, is not illegal or usurious.
8. Penal statutes are to be construed strictly.
9. Statutes against usury are penal statutes.
10. In an action by the assignee against the assignor of a note, where diligence has been used to collect the contents from the maker, the measure of damages is the amount *paid for the note* by the assignee.

SCATES, J.—This was an action of *debt* brought by the appellee against the appellant, before a justice of the peace, upon an assignment of a promissory note for \$62 51, and taken by appeal into the Circuit Court.

Upon the trial, the plaintiff below offered in evidence the note and assignment from Riplee to him, also a summons issued by a justice of the peace of Scott county, at his suit, against one S. J. Lowe, the maker of said note. He also offered in evidence, an execution against said Lowe, and the constable's return of *nulla bona* thereon.

He likewise offered in evidence another execution from the Scott Circuit Court, upon a transcript of the judgment of the justice against said Lowe, and a return by the sheriff upon it, "no property found."

He proved, by the constable in whose hands the first execution had been placed, that he had searched three times for property; that Raplee told him he believed Lowe had no personalty, and advised him to return the execution, that another might issue from the Circuit Court, to be levied upon land, which Lowe said he owned. To all which the defendant below objected, and moved the court to enter a nonsuit, which the court refused, and to which the defendant excepted.

The defendant proved that the consideration of the assignment paid him by Morgan, was \$46, or \$48, and thereupon moved the court for judgment for threefold the amount of the difference between

the sum so paid, and the amount due upon the note; which was disallowed by the court, and judgment rendered for \$48.

The appellant assigns for error,

First. The admission of the execution in evidence without first showing the judgment upon which it issued;

Secondly. The refusal to enter a nonsuit;

Thirdly. The inadmissibility of the return upon the executions, to show due diligence on the part of the appellee;

Fourthly. The improper admission of the testimony of the constable;

Fifthly. The opinion of the court in refusing to render judgment for threefold the amount alleged to have been taken as usury, is assigned for error;

Lastly. All the decisions of the court in the cause are assigned as error.

The court is of opinion that the first error is not well assigned. The appellant was a privy in interest in the suit instituted by the appellee against Lowe, the maker of the promissory note, and would have been concluded by a recovery by the defendant in that suit.

It is a well settled principle, that parties and privies in interest are concluded by a judgment. In an action, therefore, by the appellee against the appellant, upon his legal responsibility, arising out of the very assignment by which the appellee acquired a right, under the statute, to sue the maker of the note, we are of the opinion that it was not necessary to show the judgment to which he was privy, to lay a foundation for the introduction in evidence of an execution issued thereon. As between either of the parties thereto and third persons, such evidence would be indispensable; and between third persons or strangers to the record, the like rule prevails, with the exception of officers who justify under such process, against actions of trespass for alleged injuries arising from their official acts.

If the premises and corollary be correct, the court correctly refused to enter a nonsuit, which is assigned as the second error.

The third error assigned, questions the admissibility and sufficiency of the evidence, by a return of *nulla bona* on the executions, to establish due diligence on the part of the assignee, in pursuing the debtor to insolvency.

Where diligence by suit is shown, to fix the assignor's liability, such a return is a very necessary part of the plaintiff's proof. But it is also necessary to show that suit was instituted within a reasonable time after the debt became due, or assignment made; and which, by the record in this cause, appears to have been done within

Raplee v. Morgan.

three days after the debt became due. The assignee appears still further to have diligently pursued his legal remedy, by issuing two executions under which all the debtor's personalty and realty might have been sold, had he possessed any within the county.

The truth of the officer's return was not questioned on the trial.

In the case of Cowles and Krum v. Litchfield, decided at this term, this court has established the principle that such a return is evidence of the debtor's insolvency. Further to prosecute the remedy would but accumulate costs; and the case would fall within the last point resolved in the case of Thompson v. Armstrong.

Upon the fourth error assigned, we can perceive no principle of law which would exclude parol evidence to establish the fact of insolvency; or the admission of the appellant, that Lowe had no property subject to the execution issued by the justice.

The fifth and last error, that it is necessary to notice, questions the correctness of the opinion of the Circuit Court in refusing to apply the provisions of § 3 of "*An Act to regulate the Interest of Money*," to the facts in this case. The court is not disposed, nor allowed, by settled principles of law, to enlarge, by construction, the provisions of a penal statute. It is not shown, in this case, that the original consideration between the promisor and payee, was usurious; in the absence of proof, the court will not presume it. The defendant here, having in a fair course of trade discounted this note at a higher rate of interest than is allowed by law, it is contended, has contaminated it with usury. By the construction given similar statutes by the courts of the several States, the United States, and England, it is a well settled principle that such sale and purchase of a note *bonâ fide* in a fair course of trade, is not usurious, where the original consideration was fair, legal, and not tainted with usury.

On a question so plain and well settled, it is useless to multiply authorities. The court below very correctly reduced the amount of the judgment to the sum actually paid by the appellee.

Judgment affirmed.

McConnell and *McDougall*, for appellant.

Lamborn, for appellee.

(a) The following cases relate to diligence by suit under the statute: Tarlton v. Miller, Bre. R., 89; Mason v. Wash, *ibid.*, 16; Thompson v. Armstrong, *ibid.*, 23; Lusk v. Cook, *ibid.*, 53; Wilson v. Van Winkle, 2 Gilm. R., 684; Cowles v. Litchfield, 2 Scam. R., 357; Saunders v. O'Brien, *ibid.*, 370; Bledsoe v. Graves, 4 *ibid.*, 386; Bestor v. Walker, 4 Gilm. R., 10; Pierce v. Short, 14 Ill. R., 146; Brown v. Pease, 8 Gilm. R., 192; Curtis v. Gorman, 19 Ill. R., 141; Roberts v. Haskell, 20 *ibid.*, 59; Sherman v. Smith, *ibid.*, 350; Nixon v. Weybrich, *ibid.*, 600; Chalmers v. Moore, 22 *ibid.*, 359; Hamlin v. Reynolds, *ibid.*, 207.

Vandyke v. Daley. Jackson v. Haskell. The People v. McHatton. The People v. Hallett.

VANDYKE v. DALEY.

2 Scam. R., 564.

Appeal from Jersey.

WHERE a *certiorari* has been *improvidently* issued, it will be
superseded. *Supersedeas awarded.*

C. H. Goodrich, for appellee.

JACKSON v. HASKELL.

2 Scam. R., 565.

Error to Peoria.

1. A BLANK indorsement of a note is within the control of the holder, and authorizes him at any time before or upon the trial to write his own name as indorsee over it. (a)

2. The form of action in a suit instituted by petition and summons—is *debt*.

3. In actions of debt, it is error to render a verdict and judgment for damages *only*. *Judgment reversed.*

Logan, for plaintiff.

Peters and Gale, for defendant.

(a) *Smith v. Finch*, 2 Scam. R., 821; *Gilham v. State Bank*, *ibid.*, 247; *Scammon v. Adams*, 11 Ill. R., 577.

THE PEOPLE v. MCHATTON.

2 Scam. R., 566.

Motion for attachment.

A RULE upon an officer to return process must be served by copy.

Motion denied.

Scammon, for relator.

McConnel, for respondent.

THE PEOPLE v. HALLETT.

2 Scam. R., 566.

Motion for attachment.

WHERE a rule upon a sheriff to return process was served by copy twenty days before the return day of the rule, and no cause is shown, by way of response, to the rule, an attachment will be awarded.

Attachment ordered.

Scammon, for relator.

The People *ex rel.* John Davlin *v.* Auditor of State.

THE PEOPLE *ex rel.* JOHN DAVLIN *v.* AUDITOR OF STATE.

2 Scam. R., 567-571.

Motion for mandamus.

1. The school commissioner is the agent of the State and purchaser in the sale of school lands and receiving the patents therefor.
2. A delivery of a patent by the auditor to the school commissioner, vests the title in the purchaser or patentee without a formal delivery by the school commissioner to the patentee.
4. The auditor may transmit patents to the school commissioner before the purchase money falls due.
4. The presumption is that public officers perform their duty, until the contrary is shown. (a)
5. After a patent has been transmitted to the school commissioner by the auditor, for the purpose of delivery to the purchaser of school lands, an assignee of the certificate of purchase cannot, by mandamus, compel the auditor to issue to him a second patent.
6. A patent improperly issued cannot be *vacated* by mandamus.

BREESE, J.—On the 22d day of February a motion was submitted by J. Y. Scammon, on behalf of John Davlin, the relator, for a rule upon the auditor of public accounts, to show cause why he should not issue a patent to the relator, for certain lots of school land sold by the school commissioner of Cook county. Notice having been given to the auditor of this motion, the attorney, in support of it, presents the certificate of the school commissioner of Cook county, to the auditor, showing that John B. Beaubien bought the lands in question, on the 23d day of October, 1834, at the sale of the school lands at Chicago; that since the sale, Beaubien has sold, assigned, and transferred all his right, title, and interest to the relator, by assignment on the back of the certificate of purchase granted to him; that the relator has paid up the full amount of the purchase money due for the lots, and is entitled to receive a patent for the same from the governor of the State, under the act of the 16th of January, 1837. He also exhibits a paper purporting to be the original certificate of purchase to Beaubien, showing the purchase by him on the 23d of October, 1834, and that one fourth of the purchase money was paid at the time of the sale, and the residue of the payments to be completed in one, two, and three years, after which he should be entitled to a patent. This certificate purports to have been assigned to the relator, by Beaubien, on the first day of March, 1839. He also exhibits the certificate of the attorney of the school fund, etc., dated Feb. 1, 1841, showing that the amounts due on the original purchase have been paid in full, but by whom is not stated.

He further exhibits his own affidavit, made at the time of submitting the motion, setting forth that he, as the attorney of the relator, presented the original certificate of purchase and assignment to the relator, to the auditor of public accounts, and requested him to issue a patent to the relator for the lots of land mentioned therein, which the auditor refused to do, on the ground that the patent was issued in

1836, to Beaubien, the original purchaser, and forwarded to the school commissioner of Cook county. The affidavit further states that the patents were issued without any request from the school commissioner, and that Beaubien was not entitled to the same, nor did he claim any title to them; that he had not paid for the lots, and that the patents have never been delivered to him, but remain in the office of the school commissioner, and concludes by stating that at the time of the purchase of the lot of land, it was not the practice to issue patents until the lots were paid for.

In answer to the rule, the auditor returns that his refusal to issue the patent to the relator, is caused by the fact that the patent was issued to the original purchaser before the assignment to him, and before the passage of the act of the legislature, authorizing patents to issue to the assignee of such certificates: and that it has been forwarded to the school commissioner of Cook county for the original purchaser.

Upon this return, the relator moves for a peremptory *mandamus* to compel the auditor to issue the patent to him.

The determination of this motion renders necessary an examination into the legislation of the State, on the subject of the school lands.

The first act applicable to this case, is that of the 22d of January, 1829. The sixth section of which provides, that the lands shall be sold under the direction of the school commissioner, at public auction; the seventh that payment shall be made in cash, and that the commissioner shall give a certificate thereof to the purchaser, or a receipt, particularly describing the land by its subdivisions, the price it sold for, and the purchaser's name and place of residence. The eighth section provides that the commissioner shall make, to every regular term of the County Commissioners' Court of his county, a return, in writing, of all the lands sold, the price, quantity, etc., and the name and residence of the purchaser, which he shall record in a book; and the county commissioners are required to make out and forward, every three months, to the auditor, a similar statement and return, which shall be recorded by the auditor, in like manner; and it is made the duty of the auditor to make out, in the name of the governor, patents for the lands sold, which shall vest in the purchaser the fee simple; and the auditor is required, after having made an entry of their date, to forward them to the proper school commissioner, to be by him delivered to the persons entitled to them, on presentation and surrender of the original certificates.

On the 12th of January, 1833, an act was passed, authorizing sales of schools lands on a credit of one, two, and three years, the purchaser

giving a mortgage on the land, and good personal security for the payment of the purchase money, to be approved by the County Commissioners' Court.

It will be observed, that this law makes no other change in the mode of disposing of the lands, and none in the acts to be performed by the school commissioner, county commissioners, and auditor, so far as vesting the title in the purchaser is concerned. The former act, in these particulars, is unchanged, and the duty of the auditor, to send the patents to the school commissioner, for delivery to the purchasers, on the receipt of the return from the county commissioners, remaining the same.

By the act of 1833, a mortgage on the land sold, and personal security, were substituted for cash ; and it might be good policy first to vest the title by patent, in the purchaser, on which the mortgage, to be given by him, was to operate. The school commissioner may be considered the legally constituted agent of both parties, to receive the patents, and, by delivering them to him, in compliance with the act of 1829, the title was divested out of the State, and became vested in the purchaser.

The recital in the certificate of purchase, that a patent would issue on the payment of the balance of the purchase money, cannot be understood as in any manner affecting the provisions of the act of 1829, requiring the auditor to forward the patents when he received the returns, or as restraining him from issuing them before the expiration of the term of credit.

It was as necessary that the patents should issue upon a credit sale, as under the cash system, as the foundation of the mortgage the purchaser was required to give on the land as security for the purchase money, and as evidence of "a sure, perfect, and absolute title to the land so purchased and patented."

That this mortgage was given, and also personal security, will be presumed, in favor of a public officer whose duty it was made to receive them.

The patents, then, having been sent, in 1836, to the school commissioner, in obedience to the law, although Beaubien may not have received them, and although they may yet remain with that officer, the State has consummated the act of purchase, and parted with her title, and to the person who then had the undisputed interest in the lands. Assignments of these certificates were not authorized until the passage of the act of January 16th, 1837, and the relator acquired no interest until March, 1839, consequently he could not object to the act of the auditor transmitting the patents.

The People *ex rel.* John Davlin *v.* Auditor of State.McConnel *v.* Swailes.

The last-mentioned act permits a patent to issue to the last assignee, but that must be understood, in cases when no patent had issued to the first purchaser. It would be unreasonable to suppose that the legislature intended to require the auditor, after once issuing a patent, to recall it; give him power to cancel it, efface the record of it from his books, and issue another to an assignee. Such a construction of the act would not be warranted by its terms, obvious meaning, and import.

But conceding that the patent was issued improperly, and delivered to the school commissioner before the payments were completed, without any request from the purchaser, that he did not complete the payments for the land, and his assignee did, and leaving out of view all considerations of the interest of other persons not before the court, which may be affected by the proceeding; and admitting the power of the court to award a *mandamus* to compel a public officer to perform an act which he is required by law to perform, and about which he has no discretion, the court is satisfied that a case is not presented by the papers and evidence before it, to justify any other order than one denying the motion, at the costs of the relator. The patent exists; the State has parted with her title by issuing it, and it cannot be set aside or vacated by a proceeding of this kind.

*Motion denied.**Scammon*, for relator.*Lamborn*, attorney-general, for auditor.

(a) *S. P. Lattin v. Smith*, Bre. R., 284; *Buckmaster v. Job*, 15 Ill. R., 329; *Taylor v. People*, 2 Gilm. R., 349; *Job v. Tebbetts*, 5 *ibid.*, 382.

Contra, where the title to real estate depends upon the performance of a specific duty enjoined by law upon the officer: *Gaty v. Pittman*, 11 Ill. R., 21.

McCONNEL *v.* SWAILES.

2 Scam. R., 571-573.

Appeal from Morgan.

1. The dismissal of a writ of *certiorari* is equivalent to a technical affirmance of the judgment of a justice of the peace, and is a forfeiture of the *certiorari* bond. (a)
2. In an action upon such a bond, the technical judgment is for the penalty as a debt, to be discharged upon the payment of the damages assessed.
3. In actions *ex contractu* against several, where all have been served with process, the judgment must be against all, unless one or more interpose a personal defence, such as infancy, bankruptcy, and the like. (b)

BREESE, J.—Thomas Swailes, the appellee in this case, commenced an action of *debt* in the Circuit Court of Morgan county, at the October term, 1838, against Alfred W. Parsons and Murray McConnel, upon a bond executed by them, on obtaining a *certiorari*, to bring up

judgment rendered before a justice of the peace, against Parsons, and in favor of Swailes.

The summons was duly served upon both defendants, and the declaration, in the usual form, assigned as a breach of the condition of the bond, the non-payment of the debt and costs, recovered before the magistrate, and concludes with a prayer of damages laid at twenty-five dollars. To this declaration there was a demurrer, by McConnel alone, which was sustained, and leave given to amend. To the amended declaration a demurrer was also filed by the same party, and judgment rendered thereon for the plaintiff, against McConnel only, for the debt in the declaration mentioned, and an order entered directing the clerk to assess the damages, which he did, to fifty-nine dollars and ninety-six cents. The final judgment is entered up in the following form: "Therefore it is considered and adjudged by the court, that the plaintiff recover of the defendant McConnel, his debt and damages aforesaid, in manner and form aforesaid assessed, and also his costs herein expended."

An appeal was prayed for and allowed from this judgment, and the following errors are assigned, as appearing upon the record:

The court erred, First, In rendering judgment against McConnel alone, and not against McConnel and Parsons, both being sued, and both served with process;

Secondly, In rendering a judgment against McConnel, for one hundred dollars debt, and for fifty-nine dollars and ninety-six cents damages;

Thirdly, In rendering the judgment in manner and form as set forth in the record;

Fourthly, In overruling the demurrer of McConnel to the amended declaration; and

Fifthly, In deciding that the dismissal of an appeal, or writ of *certiorari*, was an affirmance of the judgment in the Circuit Court.

The second and third errors assigned run into each other, as do also the fourth and fifth, and will be considered accordingly.

This court does not entertain a doubt but that the dismissal of an appeal, or *certiorari*, is equivalent to a regular, technical affirmance of the judgment, so as to entitle the party to claim a forfeiture of the bond, and have his action therefor. The bond given in such case is conditioned "to pay the debt and costs, in case the judgment shall be affirmed, on the trial of the appeal." What is the object of this requirement, and what its meaning and intention? Manifestly to secure the opposite party in his debt and costs, in case the judgment shall not be reversed; in case he shall be, in the Circuit Court, the

successful party. By a dismissal of the appeal, either by the court, or by the act of the appellant himself, the appellee is the successful party; he has not lost what he gained before the magistrate. He is placed in the same situation he occupied before the appeal was taken; and we see no propriety in attributing to such a judgment of dismissal less efficacy than to a more formal and technical one of affirmance. In this there is no error.

As to the second and third errors assigned, it is manifest that the judgment is informally entered, and would, in its terms, subject the party to the payment of one hundred and fifty-nine dollars and ninety-six cents, instead of fifty-nine dollars and ninety-six cents, the true amount of the recovery to be collected by execution.

In entering up a judgment on a bond of this, and of like character, in an action of debt, it should be for the debt *in numero*, the penalty to be discharged by the payment of the damages actually assessed, either by the jury or the clerk upon the breaches assigned. The execution issues for the debt, with the indorsement of the clerk, of the damages assessed, and which amount only, so indorsed, the officer can collect.

This error, however, might be corrected in this court, and would be, were it not that, in the first assignment, an error is pointed out which has been decided by this court to be fatal.

In the case of *Kimmel v. Shultz et al.*, it was ruled that where a suit is brought against several joint debtors, and all are served with process, judgment must be recovered against all or none, unless one or more of the defendants interpose a defence which is personal to himself, such as infancy or bankruptcy. The obligation in this case was, by force of our statute, joint and several, and the obligors might have been proceeded against separately, and the judgment against one would then have been valid. They are, however, sued jointly, and judgment is rendered only against one, although the debt is the debt of each. The same point has been ruled by this court in the case of *Hoxey v. Macoupin County*, decided at December term, 1839, and it is too well settled to be now disturbed. It does not appear, from the record, that Parsons made any defence; judgment should, therefore, have been entered against him by default.

Judgment reversed.

McConnel and McDougall, for appellant.

Lamborn, for appellee.

(a) *Vide* *Young v. Mason*, 3 Gilm. R., 57.

(b) *S. P. Owen v. Bond*, Bre. R., 91; *Russell v. Hogan*, 1 Scam. R., 552; *Ladd v. Edwards*, Bre. R., 139; *Kimmel v. Shultz*, Bre. R., 128; *Hoxey v. Macoupin*, 2 Scam. R., 86; *Frink v. Jones*, 4 *ibid.*, 170; *Tolman v. Spaulding*, 3 *ibid.*, 14; *Wight v. Meredith*, 4 *ibid.*, 361; *Wight v. Hoffman*, *ibid.*, 362.

Delahay v. Clement.

DELAHAY v. CLEMENT.

2 Scam. R., 575-578.

Appeal from Scott.

1. WHERE a suit is commenced by *Capias*, and the writ is quashed, it is regarded as equivalent to a summons, and the case proceeds accordingly.

2. Plea in abatement—demurrer thereto sustained—defendant thereupon pleads in bar—this is a waiver of the plea in abatement. (a)

3. Where a note is made by an agent in the name of his principal, in an action upon the note it is not necessary to prove the execution of the instrument, or the agency, unless the defendant by a plea of denial verified by affidavit, is interposed.

4. A note made by an agent is *prima facie* evidence of a consideration had by the principal.

5. It is not necessary to the validity of a note made in the name of another by a stranger that a precedent authority should exist, a recognition, or subsequent ratification of the contract by the principal maker, is sufficient.

*Judgment affirmed.**McConnel* and *McDougall*, for appellant.*Lamborn*, for appellee.

(a) This point overruled in S. C., 3 Scam. R., 201; S. P. Weld v. Hubbard, 11 Ill. R., 574; McKinstry v. Pennoyer, 1 Scam. R., 819.

INDEX.



A

ABATEMENT.

1. A default is irregular when a plea in abatement or bar is on file, 31.
2. A plea in abatement is proper in attachment causes to put in issue the verity of the affidavit upon which the writ is based, 196.
3. The omission of the mortgage deed in a *sci. fa.* to foreclose cannot be reached by plea in abatement, 197.
4. Dilatory pleas must be interposed before pleading in bar, or at the earliest moment, 316.
5. Where a demurrer to a plea in abatement is sustained the judgment is peremptory for the plaintiff; if for the defendant, then the judgment is *respondeat ouster*, 338.
6. The omission of, or mistake in the christian name of the plaintiff must be pleaded in abatement, or a waiver takes place, 585.
7. The death of one of several plaintiffs, prior to the commencement of the action, must be pleaded in abatement, 658.
8. Plea in abatement—demurrer thereto sustained—defendant thereupon pleads in bar—held a waiver of the plea in abatement, 687.
9. In *fictional* actions, such as ejectments under the common law rules of procedure, the death of one or all of the lessors of the plaintiff will not abate the action, 565.

ABSTRACT INSTRUCTIONS.

A court is not bound to give an abstract instruction to a jury, 398, 617.

ACCEPTANCE OF A DEED.

A deed must not only be delivered by the grantor, but accepted by the grantee, to render it valid, 173.

ACKNOWLEDGMENT OF DEEDS.

1. A deed is valid without acknowledgment, if proved according to the common law, 596, 619.
2. Under the act of 1819, it is not necessary to the validity of a sheriff's deed that it should be acknowledged in open court, where the judgment was rendered; at all events, an acknowledgment before the court of the county where the sheriff executed the writ and the land lies, is sufficient, 97.

3. An acknowledgment of a deed by husband and wife, in due form, under the act of 1819, is sufficient proof of the execution of the deed, although the wife was not privily examined, 591.
4. But such form of acknowledgment is insufficient to divest the dower of the wife, 591.
5. Under the act of 1819, where the land lies in one county and the deed is acknowledged in another, the certificate of acknowledgment must be accompanied by a certificate of the clerk of the latter county showing the official character of the justice of the peace who took and certified the acknowledgment, 596.
6. The absence of such certificate of official character cannot be supplied by parol evidence, 596.
7. Under the act of January 31, 1827, a certificate of acknowledgment is sufficient which shows the identity of the grantor and his voluntary admission that he had executed the deed, 596.

ACTIO NON.

Actio non relates to the time of the commencement of the action, and not to the date when the plea is filed, 264.

ACTION.

1. No *action* lies upon a written instrument, unless it appears upon the face of it to whom it is payable, 97.
2. An action of slander, imputing crime to the plaintiff, lies, notwithstanding the repeal of the statute creating the offence, 11.
3. A *scire facias* to foreclose a mortgage is not an action in the ordinary sense of the term—it is proceeding *in rem*, 197.
4. An action of ejectment is in reality an action of trespass, superadding thereto an execution whereby the prevailing party obtains the possession of the land itself, 173.
5. Case lies against a sheriff for gross negligence in executing or failing to execute a writ of *feri facias*, whereby the plaintiff is damnified, 191.
6. Case lies against a constable who neglects or refuses to execute legal process placed in his hands for execution, 301.
7. To sustain an action for malicious prosecution, malice on the part of the defendant and a want of probable cause must both exist, 317.
8. Debt on a replevin bond is the appropriate form of action, 489.
9. A petition and summons is a popular action, intended to enable every creditor whose debt is certain, and evidenced by a written instrument, to bring his own suit; it is a speedy proceeding, and all intendments will be indulged in to sustain the regularity of the proceeding, 517 and *note*.

ACTIONS EX CONTRACTU.

In this class of actions against several, where all have been served with process, the judgment must be against all, unless one or more interpose a personal defence, such as infancy, bankruptcy and the like, 684 and *note*.

ACTS OF CONGRESS.

1. In certifying a record under the act of Congress, if the judge omits to certify that the attestation of the clerk is in due form, the certificate is insufficient, 48.
2. Where an act of Congress authorizes the governor of a newly-acquired territory to examine and *confirm* the titles of the settlers, his deed of confirmation is conclusive evidence of title, 149.

ACTS OF THIRD PERSONS.

The acts and declarations of third persons are not admissible in evidence, 318.

ACTUAL FORCE.

Under the forcible entry statute of 1819, actual force must have been used to effect the entry in order to justify an action under it, 26.

ACTUAL POSSESSION.

1. To sustain an action of replevin, the taking must have been from the *actual* or constructive possession of the plaintiff, 31.
2. Actual possession, in the absence of a higher grade of title, is evidence of a fee simple interest in land, 173.
3. A prior actual possession, under a claim of right, will prevail in ejectment over a subsequent naked possessory claim, 173.

AD DAMNUM.

Where a verdict exceeds the damages laid in a declaration, the plaintiff may remit the excess and the verdict will be sustained, 461.

ADDITIONAL TESTIMONY.

It is discretionary with the court to permit the introduction of further testimony after the argument has commenced, 26.

ADMINISTRATION.

1. The probate court possesses the incidental power to revoke letters of administration obtained by fraud, 218.
2. Where a creditor fraudulently procures a grant of administration upon the estate of his intestate debtor, which is afterward revoked for the fraud, no intendments will be indulged in to support an action upon his claim as creditor of the estate, 317.

ADMINISTRATORS AND EXECUTORS.

1. An administrator has no power to loan the funds of the estate, 12.
2. If one of several administrators loan moneys belonging to the estate, he alone is responsible for its loss, and he may sue alone to recover it back, 12.
3. A surety upon an administration bond is not liable unless the administrators have been guilty of a *devastavit*, 96.
4. An administrator cannot, by any contract, bind the estate of his intestate, 107.
5. An administrator has no power to compel an indentured slave to attend to the ordinary business of the administrator—the latter has simply a right to the custody of the slave until he or she can be sold, 130.
6. The statute which provides that no action shall be instituted against an administrator for a debt due by the intestate, until one year after the grant of administration, does not apply to a *scire facias* to foreclose a mortgage executed by the intestate, 197.
7. A personal judgment cannot be rendered against administrators in actions upon causes which originated in the lifetime of the intestate, 215, 657 and *note*.
8. The general issue admits the capacity in which an administrator sues, 220.
9. Where an administrator acts honestly and prudently, he will not be held responsible for a loss occasioned by his error of judgment, 227.

10. *Quære?* Is an administrator in Illinois liable for the dishonesty of a collector in a sister State, who fails to pay over money which was due and owing to the intestate by a resident of such sister State? 227.
11. A *devastavit* is unnecessary in order to sustain an action upon the bond of an executor or administrator, 231.
12. By statute, any one or more of the obligors in an executor's bond may be sued, 231.
13. Form of assigning breaches upon an administration bond, 231.
14. A judgment for costs against an administrator is not proper in an action where he is unsuccessful, 251.
15. The courts of probate have no power to enter a judgment against an executor or administrator at the instance of heirs or devisees, to compel them to pay a distributive share or legacy due them, 268.
16. A justice of the peace has no jurisdiction in a suit where an administrator is a party and the demand exceeds \$20, unless for the purchase money due at an administrator's sale, 309.
17. The statute of 1827, in reference to the sale of lands to pay intestate debts, was silent as to the county in which the administrator should file his petition; therefore, the petition may be filed in the county where the land lies. Under the act of 1829, the application must be made in the county where administration was granted, 340.
18. An administrator's deed must set forth the order of sale *at large*, 340.
A *recital* of the substance of the order is insufficient, 340.
19. Where the deed of an administrator is void it may be attacked collaterally, in an action of ejectment, 340.
20. The court, in ordering the sale of intestate lands to pay debts, cannot authorize payment in any other than gold and silver coin or other legal currency; an order substituting any other medium of payment is voidable by appeal or writ of error, or by bill of review, but cannot be impeached collaterally, 340.
21. The power to sell intestate lands for the nonpayment of debts, is a special statutory authority, and the power must be strictly pursued, and so appear upon the face of the proceedings, or the power is not well executed, 340.

ADMINISTRATOR'S SALE AND DEED.

See ADMINISTRATORS AND EXECUTORS, No. 17 to 21.

ADMISSION.

1. A vague admission cannot be relied upon as proof of a fact, 317.
2. An admission is sufficient to charge a joint defendant as a co-partner, 569.

ADVERSE PARTY.

1. In civil causes, a reasonable notice must be given the adverse party of a motion for a change of venue, where the ground relied upon is the prejudice of the inhabitants of the county where the suit was instituted, 276.
2. The assignor of a note is not the "*adverse party*" within the meaning of the statute which compels such party to become a witness before a justice of the peace, where a suit is brought by the assignee against the maker, 288.

Under this statute, if the "*adverse party*" was present at the trial he may be sworn without prior notice, otherwise notice must be given, 315.

But if absent, notice to his attorney is insufficient, 315.

The same rules prevail upon the trial of appeals from the justice, 315.

ADVISEMENT.

No statute, unless it contains an express prohibition, can prevent a court from exercising its common law power of taking a cause under advisement, 41.

AFFIDAVIT.

1. *In Attachment*—Must strictly comply with the requisitions of the statute, 142.
Must state the amount and nature of the indebtedness, 163.
This requisition is complied with by stating that the defendant is indebted to the plaintiff "in the sum of \$1,400—by his certain instrument of writing signed by himself," 163.
Objections to this class of affidavits should be made in the court below; but little favor will be shown such objections in the appellate court, 163.
Such affidavits amendable, 644.
2. *For a Continuance*.—Where a party, upon affidavit, applies for a continuance, the adverse party may admit the facts and insist upon a trial; but every fact stated in the affidavit must be taken as true, 396.
An affidavit which conforms to the statute entitles the party to a continuance, 530.
What diligence is sufficient to entitle a party to a continuance? 530.
3. *Affidavit of Jurors*.—Cannot be received to impeach their verdict, 5.
Nor that of the defeated party setting forth statements made by one of the jurors, 31.
4. *For a new Trial*.—On a motion for a new trial, upon the ground of newly-discovered testimony, the affidavit must set forth the names of the witnesses and the facts they will depose to, 31.
5. *No Part of the Record*.—Affidavits filed in the court below are not a part of the record in the appellate court, unless made so by a bill of exceptions, 42, 397.
6. *In Partition*—In partition causes, affidavits are proper on a motion to set aside the report of the commissioners, 629.
7. *Publication*.—Against non-resident defendants is based upon affidavit of non-residence; no order of court thereon is necessary, 460.
8. The affidavit of a party is sufficient to prove that a writ has been delivered to the sheriff, 615.

AGENCY.

1. An agent must execute a written instrument in the name of his principal, 104, 263.
2. Where a declaration is against the principal, but does not show his obligation, but that of the agent, the judgment will be arrested, 104.
3. The county commissioners are the agents of the county, 241.
4. At common law, the agents of a county have no power to convey real estate belonging to the county, 440.
But by the act January 7, 1835, the county commissioners may do so, 440.
5. The principal is not liable for the willful acts of his agents or servants, unless he advised, directed, or assisted in the commission of the wrongful act, 642.
6. The school commissioner is the agent of the State and purchaser in the sale of school lands, and receiving the patents therefor, 681.
Therefore, a delivery of a patent by the auditor to the school commissioner vests the title in the purchaser, without a formal delivery by the school commissioner to the patentee, 681.
7. Where a note is made by an agent in the name of his principal, in an action upon the note, it is not necessary to prove the execution of the note or the creation of the agency, unless the defendant, by a plea of denial verified by affidavits, put these facts in issue, 687.
8. A note made by an agent in the name of his principal is *prima facie* evidence of a consideration had by the latter, 687.
9. A subsequent ratification by a principal of a contract, which purports to have been made in his name by a stranger, is equivalent to a precedent authority, 687.

AGREED CASE.

1. It is error to enter judgment against one of several defendants upon an agreed state of facts, where all joined in the submission, 50.
2. Form of an agreed case, 57.
3. An agreed case in the nature of a special verdict, 350.

AGREEMENT.

1. The laws in force at the time of the making of an agreement enter into and form a part of it, as though they were embodied in the written instrument, 201.
2. An agreement to attend a public land sale and bid on account of the principal is not illegal, and an action for non-feasance lies thereon, if the agent neglects to bid, he being promised a reward for his services, etc., 287.

ALIENS.

1. An alien is an incompetent juror, 424.
2. Under the Constitution of 1818, an alien inhabitant of this State, who had resided within its territorial limits six months next preceding a general election, is a qualified voter, 623.

ALIMONY.

Practice in cases where the husband obtains a divorce, but alimony is allowed to the wife, 304.

ALLEGATA ET PROBATA.

Must correspond in equity causes, 381.

ALTERATIONS, INTERLINEATIONS AND ERASURES.

The alteration of a note, in a material part, by the payee, without the consent of the maker, renders it void, 183.

AMENDMENTS.

1. Amendments are discretionary with the circuit courts, and their decisions in granting or refusing them will not ordinarily be reviewed by the appellate court, 505.
2. All the cases on amendments decided by the Illinois courts collated, 505, *note*.
3. The refusal of the circuit court to permit the amendment of a petition and summons cannot be assigned for error, 505.
4. In a proper case, where a technicality occurs, the appellate court will grant a *certiorari* upon an allegation of *diminution*, with leave to amend, and upon the return of the writ bringing up the amended record, the judgment below will be affirmed, 105.
5. But where there is nothing in the record to amend by, a *certiorari* would be unavailing, 105.
6. The supreme court will at a *subsequent term* amend their record in matters of form, *ex. gr.*, changing the christian name of the appellant, where it is evidently a mistake and there is something to amend by, 258.
7. Before answer filed, the complainant has a legal right to amend his bill in equity, 286.
8. The amendment of pleadings is in general discretionary, and a decision upon such application cannot be assigned for error, 439.
9. Where the plaintiff amends his declaration upon a note by adding the words—after the descriptive part of the instrument—“with 12 per cent. interest from date, until paid”—this is a *substantial* amendment, and entitles the defendant to a *continuance*, 454.

10. On appeal from a justice of the peace, the circuit court cannot permit an amendment to avoid the legal effect of a misjoinder of parties defendant, 484.
11. Nor can an amendment be allowed upon appeal, where the justice had no jurisdiction, 484.
12. Nor can the circuit court change, by amendment, the form of the original action on the parties thereto, under pretence that an appeal must be tried *de novo*, 484.
13. The amendment of a plea after a demurrer is sustained thereto, is a waiver of the demurrer, 531.
14. If, after an appeal taken, the circuit court permits the sheriff to amend his return, a writ of *certiorari* will be awarded by the supreme court, to send up the amended record, 615.
15. After a demurrer is sustained to a plea, it is discretionary with the court whether permission shall be given to amend the plea or file a new one as a substitute, 622.
16. An attachment bond may be amended by adding the seals of the parties thereto, 648.
17. Writs are amendable by inserting the words "the People of the State of Illinois" so as to conform to the constitutional requirement, 648.
18. Such amendment may be made upon the trial of an appeal from a justice where the original writ was defective, 648.
19. And the words may be inserted in any part of the writ, 648.

AMENDMENTS AND JEOPAILS.

Where parties to an action go to trial without a plea and issue, the verdict will cure the defect under the statute of amendments and jeofails, 13.

ANSWER IN CHANCERY.

1. Where an answer is filed in term time the complainant has four days to reply, 522.
2. If the answer to an injunction bill denies the equity of the complainant, the injunction must be dissolved, 522.
3. Where it appears upon the face of an answer that a third person is interested in the cause, who has not been made a party, the bill will be dismissed, 473.
4. The answer of a guardian, *ad litem*, should deny the equity of a bill filed against his wards, 546.

APPEALS.

I.—General Principles.

1. The rule in all appeal causes is, that if the inferior court had jurisdiction *ab origine*, no subsequent fact arising in the case can defeat it, 266.
2. Appeals unknown to the common law, 445.
3. Statutes giving the right of appeal, with a view to a trial *de novo* in the appellate court, must be construed strictly, 445.
4. A general statute giving appeals will not ordinarily be extended to extraordinary actions authorized by special statutes, 445.
5. If an appeal is irregular, and yet the appellee appears in the appellate court, and tries the cause without objection, he waives all irregularities in the perfection of the appeal, 460.

II.—Appeals in rem.

No appeal lies in a proceeding *in rem*, unless the owner or other person interested in the thing makes himself a party to the suit by interpleader, appearance, or in some other known mode, 445.

III.—*Appeals in Equity.*

By consent of record, an appeal will lie from an interlocutory order of the inferior court dissolving an injunction, 14.

Contra where no consent is given, 14, *note*.

IV.—*Appeals from the Circuit Court to the Supreme Court.*

1. Lie in all cases where the judgment is final and amounts to \$20 exclusive of costs, or relates to a franchise or freehold, 165, 487, 499, 651.

In all such cases, the appeal is a *matter of right* upon the appellant's complying with the statutory requirements, 487.

The circuit court has no power to impose *any conditions whatever* upon the party who demands the appeal, and offers to comply with the terms of the statute, 487, 651.

2. In appeal causes, the transcript of the record in the court below must be filed in the supreme court clerk's office, by the third day of the term, or the appeal will be dismissed, 195, 197.

Negligence of counsel is no excuse for non-compliance with the positive requirements of the statute, 197.

3. Where an appeal is taken for delay, damages will be awarded, 181.
4. A variance between the judgment appealed from and the recitals in the condition of the appeal bond are fatal, even when slight, and the appeal will be dismissed, 472.
5. When an appeal has been dismissed, even on a technical ground, the supreme court will not permit the withdrawal of a transcript of the record, with a view to a writ of error, 472.
6. An appeal may be taken at any time during the term of the court in which the judgment was rendered, 487.

V.—*Appeals from the Probate to the Circuit Court.*

1. On appeals from the probate to the circuit court, the bond must be payable to "the People of the State of Illinois," etc.; a bond to the appellee is void, and the appeal must be dismissed, 339.

It is discretionary with the appellate court to permit an amendment of the bond, and thus perfect the appeal, 339.

2. On an appeal from the probate court rejecting a will because of the insanity of the testator, the trial must be *de novo*, 585.

And the cause may be tried before a jury, 585.

On such trial, no other evidence of insanity is admissible than that of the subscribing witnesses to the will, 585.

But the witnesses are not confined in giving their opinion to the facts which transpired when the will was executed, but may testify as to antecedent facts, 585.

VI.—*Appeals in Cases of the Trial of the Right of Property.*

1. Where a case originates before a sheriff and jury in the trial of the right of property, and the record in the circuit court on appeal does not show that that court could entertain jurisdiction of the appeal, the supreme court will reverse the judgment, 87.
2. In this class of cases, the appeal must be perfected under the act of July 29, 1827, by executing the appeal bond on the day of the rendition of the verdict complained of, 816.
3. A motion to dismiss an appeal in this class of cases is addressed to the sound discretion of the circuit court, and its decision thereon cannot be assigned for error in the supreme court, 450.

4. The appeal bond may be executed by an attorney in fact, 450.
5. And the supreme court will presume his authority to execute the appeal bond where the record is silent, 450.

VII.—*Appeals in Forcible Entry and Detainer Causes.*

1. On appeal from a justice to the circuit court, in an action for a forcible entry and detainer, it is discretionary with the appellate court to permit a defective appeal bond to be amended, and its decision on such application cannot be assigned for error in the supreme court, 527.
2. Upon the dismissal of an appeal in forcible entry and detainer, the circuit court may award a writ of restitution, 527.

VIII.—*Appeals under the Inclosure Act.*

An appeal lies from the judgment of two justices of the peace, under this statute, 448.

IX.—*Appeals under the Vessel Attachment Act.*

No appeal lies under this statute, 445.

X.—*Appeals from Justices of the Peace.*

1. *General Principles.*—An appeal is assimilated to an equity cause, 52.
 Must be tried *de novo*, 265, 465.
 Dilatory defences must be made before the justice, or they are waived, 52.
 Infancy is not a dilatory defence, 465.
 The policy of the law is to try causes before justices upon their merits, and the circuit court will not tolerate technical objections upon the hearing of an appeal from their judgments, 310.
 A set-off is waived, if not pleaded or relied upon before the justice, 532.
 The rules of evidence are the same on the trial of an appeal as prescribed by statute in trials before the justice, 315
 On appeal, the circuit court cannot permit an amendment to avoid the legal effect of a misjoinder of parties, 484.
 Nor can an amendment be allowed where the justice had no jurisdiction, 484.
 Nor can the form of the action be changed by amendment, 484.
 Nor can the parties be changed, 484.
 Where a cause originated before a justice of the peace, and a jurisdictional defect exists, and upon the hearing of the appeal in the circuit court judgment for the plaintiff is affirmed, the supreme court will reverse each judgment, and not remand the cause, 484.
 Where an appeal is taken from the judgment of a justice upon a promissory note, upon the trial of the appeal, interest must be computed upon the note, and not upon the judgment appealed from, 265.
 A judgment may be entered by the circuit court upon the hearing of an appeal for more than one hundred dollars, provided the increased amount grows out of the accumulation of interest upon the original demand, and the justice originally had jurisdiction, 265, 289.
2. *Practice in Appeal Causes, etc.*—An appeal is to be regarded as taken, when the appeal bond is filed with the justice or clerk of the circuit court, and no action of the legislature, or neglect of the judge clerk, or justice, can defeat it, 641.
 On an appeal from a justice to the circuit court, it is not necessary that the appeal bond should be executed in the presence of the clerk; it is sufficient if the bond is filed in the clerk's office within the time prescribed by law, and the clerk either expressly or by implication approves of, or treats the bond as a legal obligation, 431.

- If, upon the filing of the bond, the clerk issues a summons, and *supersedeas*, this state of facts raises the presumption that the clerk approved the bond, 431.
- If an appeal bond is illegal, a new bond may be filed, and the appeal thus be perfected, 310 and 431.
- An appeal does not lie from the judgment of a justice rendered upon the award of arbitrators, to whom the cause had been referred, 651.
- One of several defendants may appeal from the judgment of a justice, 514.
- In such case, the cause should be docketed in the name of the party appealing, 289.
- When the circuit court dismisses an appeal for want of jurisdiction, the order for costs should be against the appellant, 342.
- Where an appeal is dismissed on motion of the appellant, costs should be awarded against him, 342.
- If the appeal is dismissed and the reason does not appear of record and costs are awarded against the appellee, the supreme court will reverse the judgment, 342.
- A defendant who appeals from the judgment of a justice of the peace cannot rule the plaintiff to give security for costs in the circuit court, 182.
- Where a statute provided that neither party should be allowed a continuance after the second term of the court to which the appeal was returnable, this does not prevent the court from taking the cause under advisement, 41.

APPEAL BONDS.

- Where an appeal bond is defective, a new one may be filed in civil causes, on appeal from a justice's judgment, 310, 421, 431.
- In cases of appeal from the probate court, it is *discretionary* with the court, 339.
- In criminal appeals from a justice's conviction, the appeal must be dismissed where the bond is defective, 322.
- So, in cases of appeal from the circuit to the supreme court, the appeal must be dismissed, 472.
- An appeal bond may be executed in the name of the appellant by his attorney, in fact, 450.
- And where an appeal bond purports to be thus executed, and the record is silent as to his authority, the supreme court will presume the power, 450.
- A variance between the recitals in the condition of an appeal bond and the judgment appealed from is fatal, 472.

APPEARANCE.

- Cannot cure a writ which is absolutely void, 3—*contra*, 309.
- Contra* where the writ is voidable only, 309, 643.
- Courts will presume the authority of an attorney to appear for his client, 86.
- Where one of two defendants is served with process, and the other appears by attorney, it is erroneous to enter a judgment against one alone in actions *ex contractu*, 86.
- A surety is not bound by a recognizance for the appearance of the accused in a criminal cause, where the latter has neither been arrested nor voluntarily appeared to the indictment, 164.
- An appearance by attorney is valid, though he had no authority to appear; the remedy of the injured party is against the attorney, 165.
- Two defendants—one served with process, the other not—the party served employed an attorney; the latter filed a demurrer, which apparently recognized the appearance of both defendants; this demurrer was overruled—thereupon the attorney filed pleas in bar in behalf of him only who had been served—*held*, that the other defendant was not in court, 210.
- Appearance cures the want of service, 496.
- And also a defective return, 496.

APPELLATE JURISDICTION.

The supreme court, in the exercise of its appellate jurisdiction, examines and reviews the *errors* of the inferior tribunal, and will not tolerate the practice of delay in asserting *technical* rights, where the error might have been rectified, if pointed out in due season—but, on the contrary, will, in support of the judgment below, resort to the doctrine of *presumptions* and *waivers*, 486, 492.

APPOINTMENTS.

In civil and criminal cases, a justice of the peace may, in cases of emergency, *appoint* a constable *pro tem.* to serve the summons or warrant, 432.

But he must indorse the appointment upon the ^{back} of the writ under his hand and seal, 432.

The appointing power of the governor discussed, 533.

APPRAISEMENT.

Where the statute required the sheriff to cause an appraisement of lands levied upon under an execution, before sale, and to sell the same for not less than two-thirds of its appraised value, and he fails to recite a compliance with the statute in his deed, and there is no proof as to the fact, the court *will not* presume, in support of the title derived under him, that he performed his duty in the premises, 53.

APPRENTICESHIP.

Where a minor sues for work and labor, a legal indenture of apprenticeship is a bar to the action, 595.

Foreign indentures constitute such a bar, where the work was performed under them, outside the State of Illinois, and in the State or nation where he was bound to service, 595.

An indenture signed by the minor and his father in a sister State is valid, 595.

If a foreign apprentice *voluntarily* serves his master under his indentures in this State, he cannot recover for work and labor done under such apprenticeship, 595.

But if his service is *compulsory* in Illinois, he can recover the value of his labor, 595.

ARBITRATION AND AWARDS.

I.—Common Law Submission.

In debt upon an arbitration bond, the declaration need not aver that the writing obligatory was signed by both parties, 507.

But in an action upon the award, a mutual submission must be shown, 507.

An arbitrator may examine a witness in the absence of both parties, 524.

Where an award directed the parties to execute mutual releases, and also that one of the parties should pay to the other a certain sum of money, and the one who was entitled to the money tendered to his adversary a release, upon condition that the latter would pay him the sum of money awarded him by the arbitration, on the day specified in the award, and the party to whom the tender was made refused to accept the release, but made no objection to the terms proposed; on the contrary, placing his refusal upon the simple ground that the award was void—*held*, that the tender was good, 524.

II.—Under the Statute of January 6, 1827.

This statute is to be construed literally and strictly, 40.

An agreement to submit a matter not pending in action, must make the *submission* and not the *award* a rule of court, 146.

Where this requirement is not complied with, a judgment upon the award is erroneous, 146.

But the submission bond may be regarded as a common-law obligation and an *action* will lie for the breach of it, 146.

The court cannot set aside the award for any common-law cause, but only for those causes expressly designated in the statute, 40.

The award must be enforced by a rule upon the party against whom the award was made to show cause why the award should not be executed, and if no sufficient cause is shown, the award will be enforced by attachment for contempt, 40.

No judgment can be entered on the award, and enforced by execution, 40.

Where the court enters a *judgment* upon the award instead of granting a *rule*, etc., the judgment will be reversed and the cause remanded for further proceedings, in conformity with the *letter* of the statute, 40.

If a party has any legal objection to the award, and fails to make it before the circuit court, the supreme court will not reverse the order enforcing the award, 161.

If an award is not made under the statute, there is no necessity for swearing the arbitrator; if made under the statute, the supreme court will presume that he was sworn, 161.

Where no fraud is averred and proved, the supreme court will presume that the award was legal, 161.

Where the submission requires the hearing to take place, or the award to be made on a particular day, and there is no evidence as to when the duty was performed, the supreme court will presume that it was on the day named, 162.

Where an action pending in court is referred to arbitration, and an award is reported for enforcement, the court will presume that the arbitrators acted in conformity with the statute, 303.

If the award is illegal, the defeated party must point out the irregularity by affidavit, unless the defect appears upon the face of the award, 303.

ARREST OF JUDGMENT.

Where the declaration is against the principal, but does not show his obligation, but that of the agent, the judgment will be arrested, 104.

Objections to the form of an indictment must be made on a motion to quash; they cannot be reached by a motion in arrest, 121.

Where there are several counts in an indictment, some *good* and others bad, the judgment will not be arrested, 121.

ASSAULT, ETC.

An indictment for an assault with intent to murder must aver an unlawful and felonious intent, 121, 321.

Throwing a cripple out of a wagon, and leaving him to take care of himself during inclement weather, with intent to kill him, is an assault with intent to murder, 569.

In trespass for an assault, etc., the venue is transitory, and a variance as to the place where the act was committed is immaterial, 343.

To an action of trespass for an assault, battery, and false imprisonment against a justice of the peace, it is no justification to plead that an affidavit was filed before him charging that the plaintiff "entered the close of A. and carried off her grain," upon which affidavit the justice issued a warrant against the plaintiff for larceny—no felonious intent being charged, 17.

ASSESSMENT OF DAMAGES.

A writ of inquiry to assess damages may be executed in open court, 19.

Where a defendant makes default, he is, as a general rule, *out of court*, but he may cross-examine the plaintiff's witnesses, 298. f

Where an inquisition or assessment is erroneous, the remedy of the defendant is to move for a new inquest or re-assessment, 298, 300, 564.

A writ of inquiry to assess damages upon a default may be executed in term time in the presence of the court, or in vacation before the sheriff and a jury, 300.

If in vacation, it may be executed in any part of the sheriff's bailiwick, 300.

Where matters of law and fact are submitted to the court for trial, and judgment is rendered for the plaintiff, the court may direct the clerk to assess the damages, 486.

Vide also RIGHT OF WAY.

ASSIGNEE OF A PROMISSORY NOTE.

I.—General Principles.

Where a loss must fall upon either the maker or assignee of a note, natural justice points to the former as the one upon whom it should fall, 66.

Possession of a note, after its assignment, by the payee, is *prima facie* evidence that it has been re-assigned to him, 180, 626, 649.

And where the payee has indorsed the note, and yet brings a suit upon it, describing himself as *assignee* and also as payee, the declaration is good; the former allegation may be rejected as surplusage, 180.

Where a note is assigned in blank, the holder may write his own name over the signature of the indorser as indorsee, 680.

II.—Pleadings.

Where an assignee declares upon a note, against the maker, he need not aver a consideration for the assignment, 8.

III.—Assignee after Maturity.

Takes the note subject to all equities which existed between the original parties, 24, 635.

IV.—Assignee before Maturity.

Takes a title to the money due according to the tenor of the note, discharged of all equities existing between the original parties, except

1. Where the note was absolutely void by reason of a statute declaring it so;
2. Where it was obtained by fraud or circumvention;
3. Where the assignee had notice of the fact that the note was not legally binding upon the maker, or that the consideration had wholly or in part failed, 246, 482, 616.

V.—Liability of Assignor to Assignee.

1. Where the assignee has used due diligence, by suit, to recover of the maker, 15, 20, 38, 423, 614, 618, 677.
2. Where the maker was insolvent when the note matured, 613, 614, 677.
3. Where the maker was absent from the State when the note fell due, 28, 479.

Notice of non-payment unnecessary to charge the maker, 479.

Diligence by suit is defined to be the exhaustion of all ordinary legal remedies. The assignee is not bound to sue out a *capias* against the body, or resort to a bill in equity, 614, 618, 677.

The record of the cause against the maker is evidence of diligence, 613, 677.

The suit must be commenced at the first term of the circuit court held after the note matures, 38, 614.

If the amount in controversy is within the jurisdiction of a justice of the peace, and the assignee recovers a judgment before the justice, an execution returned *nulla bona* as to personalty is insufficient. The assignee must file a transcript in the circuit court, in order to reach any lands which the maker may have an interest in; and then a second return of *nulla bona* will be regarded as diligence, 618, 677.

Parol evidence is admissible to prove the insolvency of the maker when the note matured, 677.

The admission of the maker or assignor is also competent evidence, 677.

VI.—*Evidence of Assignee's Title.*

An indorsement in blank is sufficient to prove title in a holder, 564.

And he may write a formal assignment over the blank signature of the assignor, 680.

VII.—*Assignee of a Moiety.*

Acquires no legal title, 456.

VIII.—*Accommodation Paper.*

Where A. indorses a note without any consideration, but simply to accommodate the assignee, the latter can maintain no action upon the indorsement, 625.

IX.—*Several Indorsements.*

The assignee cannot bring a joint action against several consecutive indorsers, 421.

X.—*When Assignee may be a Witness.*

When it appears that he took the note by assignment as agent for a third person, 589.

XI.—*Assignment to an Agent.*

When a note is assigned to "A., Cashier," the assignee can maintain an action upon the note in his own name, 593.

XII.—*Equity.*

Where an assignee recovers a judgment at law against the maker, and the latter files a bill in equity to enjoin the judgment, the maker is a necessary party to the suit, 625.

XIII.—*Measure of Damages.*

In an action by assignee against the assignor of a note, the measure of damages is the sum paid by the former to the latter, 677.

ASSIGNEE OF A JUDGMENT.

Where a judgment is assigned, execution should nevertheless issue in the name of the assignor, 449.

The assignee of a judgment is not liable in an action for money had and received, where the judgment is reversed on appeal, after the money is collected and paid over to him by a constable, 449.

ASSIGNMENT.

I.—*Bail Bonds.*

Under the act of March 22, 1819, bail bonds could not be assigned by the sheriff to the plaintiff in a civil action, 37.

II.—*Bond to Convey Land.*

Not assignable at common-law or under the statute so as to vest the legal title in assignee, 182.

III.—*Breaches.*

1. Form of assigning breaches on an executor's bond, 231.
2. Form of assigning breaches upon a replevin bond, 489.

IV.—*Creditors.*

Assignment for the benefit of creditors sustained, 508.

Parol evidence is inadmissible to prove the assignment, when the deed is in possession of the party claiming under it, 508.

It is not immoral or illegal for a debtor to prefer one or more of his creditors, 508.

A debtor may assign all of his estate to a trustee for the benefit of his creditors, or any one of them, standing in a confidential relation toward him, 508.

A deed of assignment to pay—1. The expenses of the trust; 2. Certain preferred creditors, if they should assent to the deed within 60 days; 3. The other creditors in full or *pro rata*, they consenting within 60 days; and, 4. The surplus to the assignor—is a legal and valid deed, 508.

The fact that three creditors are omitted, because they had prior liens, does not invalidate the assignment, 508.

V.—*Dower.*

A petition for the assignment of dower should aver all of the facts requisite to establish the widow's right; in other words, she must aver—1. The seisin of her husband at law or in equity of the particular land in question; 2. Her marriage; and, 3. His death, 333.

VI.—*Errors.*

1. A party cannot assign his own mistake as an error of the inferior court, 210.
2. Nor a decision made in his favor, 210.
3. No error will be regarded by the supreme court unless *specifically* assigned, 423.
4. No error can be assigned which contradicts the record, 446.
5. A decision of the circuit court upon a subject matter which addresses itself to the discretion of the judge cannot be assigned for error, 450, 454.

VII.—*Judgment.*

Rights of the parties to an assigned judgment, 449.

VIII.—*Notes.*

Distinction between statute of Anne and Illinois statute as to the assignment of promissory notes, 15.

IX.—*Torts.*

Are not assignable, 578.

ASSIGNOR.

The assignor of a note who indorsed it after maturity, is liable to refund to the assignee, if, at the time of the assignment, the maker was insolvent, 210.

The assignor of a note is not the "*adverse party*," within the meaning of the statute which compels such party to become a witness before a justice, where an action is brought by the assignee against the maker, 288.

The assignor of a note is not a competent witness to prove *when* the assignment was made, 401.

The assignor of a note cannot be sued *jointly* with the maker, 484.

Vide also ASSIGNEE, ASSIGNMENT, PROMISSORY NOTES.

ASSUMPSIT.

Lies against a bank to recover the contents or value of bills or notes of the bank, destroyed by fire while in the hands of a *bond fide* holder, 555.

ATTACHMENT.

1. Lies against a non-resident of the State, 163.
2. Requisites of the affidavit, 163.
3. The declaration will not aid a defective affidavit, 163.
4. Objections to the form of the affidavit must be made in the court below, 163.
5. Against vessels, is a proceeding *in rem*, 445.
6. No appeal lies from the justice's judgment, in cases where vessels are attached, 445.
7. Where on the trial of the right of property, the contest arises between a stranger and the attaching creditor, the writ of attachment and return thereon is admissible in evidence, 451.
8. An attachment bond must be sealed by the principal and surety, 464.
But the bond may be amended where the seals are omitted, 648.
Where, however, the principal *only*, moves to amend by adding his seal, the cause must be dismissed, 464.
9. A writ of attachment which neither designates the court from whence it emanated, or to which it is returnable, or omits the return day, is void, 496.
10. An attachment bond is void which omits to recite the court in which it is to be filed, and from whence the writ of attachment issued, 496.
11. The attachment statutes to be *strictly* construed, 496.
12. An attachment in aid of a summons is a process, and a part of the proceedings in the original cause, 643.
The word "*term*" means "*time*," as used in the statute which authorizes the issuing of an attachment in aid of a summons, 643.

ATTESTING WITNESSES.

Under the ordinance of July 13, 1787, *three* attesting witnesses were necessary to the validity of a will, 32.

Where there *are three* subscribing witnesses, but one of them was a *devisee*, this held a compliance with the ordinance, 32.

ATTORNEY IN FACT.

Must execute his power in the name of his principal, 197.

Appeal and supersedeas bonds may be executed by an attorney in fact, 401, 450.

And his authority will be presumed, in the absence of counter proof, 401, 450.

ATTORNEYS, COUNSELLORS, AND SOLICITORS.

- Cannot delegate their authority, 43.
- And if they employ a substitute, cannot recover for his services from their client, 43.
- Office and duties of, discussed, 258.
- Cannot confess a judgment when retained to defend, 258.
- No right to alter *process* before execution thereof, 258.
- Where an attorney acts *illegally* he will not be stricken from the rolls for this cause, unless his *motives are corrupt*, 258.
- Where a *stranger* moves against an attorney his affidavit must be *positive*, 258.
- Soliciting business by an attorney censured, 258.
- The authority of an attorney to appear will be presumed, 323.
- An attorney in taking a deposition must not dictate or write the answer of the witness, 446.
- The supreme court will not presume he did, 446.
- The court is bound by the agreements of opposing counsel as to the admission of evidence, 551.
- Cannot be enrolled *nunc pro tunc*, 617.

AUTHENTICATION.

- To authenticate a record under the constitution and laws of the United States, the presiding judge of the court must certify that the attestation of the clerk is in due form, etc., 48.
- The mode of authenticating a statute of a sister State is for the secretary or keeper of the rolls to certify that the transcript is a perfect copy of the original, and authenticate his certificate by affixing the great seal of the State thereto, and then the governor must certify to the official character of the secretary, 401.
- Where the secretary omits to affix the seal to *his* certificate, the transcript is not duly authenticated, 401.
- And the attachment of the seal to the governor's certificate will not aid the omission, 401.

B

BAIL.

- A motion to discharge bail, in civil actions, is addressed to the discretion of the circuit court, 466.
- When the bail is discharged, the *ca. ad. resp.* stands as a summons, and the court may proceed accordingly, 466.

BAILABLE OFFENCES.

- Larceny is a bailable offence, 24.

BAIL BOND.

- Under the act of March 22, 1819, the sheriff has no power to assign to the plaintiff the bail bond in a civil action, 37.

BANKS.

1. All banks may receive money on deposit, 31.
2. The receipt of a cashier is evidence against the bank of a deposit, 31.
3. A clause in a bank charter which requires the directory to use diligence in the collection of debts due the bank is merely directory, and their omission does not discharge a surety upon the indebtedness, 126.

4. A debt due the old State Bank was due to the State of Illinois, 161, 197, 249.
And the legislature may release it, 161, 197.
5. The notes of the old State Bank were *bills* of credit, and therefore illegal, 235.
And a borrower of them has a good defence against a recovery at the suit of the bank, 235.
6. The old State Bank not liable for costs, 314.
7. Where a bank obtains judgment upon an illegal consideration, and afterward takes the notes of her debtor for the amount of the judgment, the notes are not tainted by the original illegality, 454.
8. Where the notes of a bank are destroyed by fire, while in the possession of a *bond fide* holder, the bank is liable in assumpsit for the sum due upon such notes, 555.
9. A bank may for convenience cause notes purchased or discounted by them to be assigned to their cashier, 593.
And the cashier is vested with the legal title, and may sue thereon, 593.
But any defence against the bank may be pleaded in bar to such action, 593.

BANK NOTES.

There is no difference between a bank bill and a bank note—the terms are synonymous, 590.

On the trial of an indictment for having in possession a forged bank bill, with intent, etc., where the indictment purported to set out the bill in *hæc verba* these variances were held immaterial: 1. The note was lettered “C,” which was omitted in the indictment; 2. The note was payable to “B. Aymar or bearer”—the indictment recited it as payable to “B. Aymer, bearer,” 590.

BANKRUPT DISCHARGE.

A discharge of the indorser of a note, under the bankrupt laws of a sister State where the indorsement was made, is no bar to an action upon the indorsement in the courts of this State, 15.

BIBLE.

The oath of a witness need not be taken upon the Bible, it may be administered by the uplifted hand, 23.

BIDDERS.

At a public sale of canal lands, the commissioners have no power to impose any other conditions upon the bidders than those specifically enumerated in the statute, 451.
Where the canal commissioners sue a bidder at a public sale of canal lands, to recover the purchase-money bid, they must aver that the sale was *public*, and the defendant the highest bidder, 451.

BIGAMY.

The license of the clerk, and the certificate of the officer or minister who solemnized the marriage is evidence of the relation of husband and wife, if properly authenticated, 553.
Oral evidence of a marriage, in fact, is competent without resorting to record evidence, 553.

BILL OF CREDIT.

The notes of the old State Bank of Illinois were bills of credit, and illegal under the Constitution of the U. S., 74, 235, 454.

BILL IN EQUITY.

A bill may be dismissed on motion, where there is no equity upon the face of it, 30, 84, 102.

All persons in interest should ordinarily be made parties to a bill, 76.

A bill will be dismissed on the hearing for want of proper parties, though no demurrer was interposed, 473.

Where fraud is relied upon, it should be specifically charged in the bill, 624.

Where the equity of the complainant is defectively set forth, the bill must be dismissed, 672.

BILL OF EXCEPTIONS.

1. Origin of a bill of exceptions, 519.

2. When signed and sealed becomes a part of the record, 519.

No necessity for the judge to appear in the appellate court and confess his seal, as at common-law, 519.

3. Must be signed by the judge, 519.

4. Must be sealed by the judge, 519.

5. Exceptions must be taken on the trial and before jury is discharged, 99, 277.

Where a jury is waived the bill of exceptions may be tendered at any time during the term, 41.

Contra.—When a jury is waived and the matters of law and fact are tried by the court, no bill of exceptions will lie, 277, 310, 323, 349.

6. A bill of exceptions lies—

1. For receiving improper testimony ;

2. For rejecting proper testimony ;

3. For misdirecting the jury on a matter of law, 99, 277, 551.

Also, as the record technically consists only of the process and return thereon, the pleadings of the parties, the verdict of the jury, and the judgment of the court thereon, all else must be preserved upon the record by means of a bill of exceptions, 42.

Thus, it must preserve—

1. Affidavits, 42 ;

2. The instrument declared on, 196 ;

3. Reasons of a motion, etc., 300.

It is proper to preserve upon the record a motion and affidavits upon an application to set aside the report of commissioners under the partition statute, 629.

7. The bill must affirmatively show that it contains all of the evidence, where the party excepting asks for a new trial, on the ground that the verdict is contrary to the evidence, 658.

Where a statement to this effect is omitted, no intendments will be made in behalf of the excepting party, 612.

When the bill does not affirmatively show that a question put to a witness was illegal, the supreme court will affirm the judgment, 440.

And where a question is put to and answered by a witness, in the face of an objection by the opposite party, the supreme court will not reverse the judgment for the illegality of the question, when the bill omits the answer of the witness, 658.

The bill must show all of the evidence upon the point of error relied upon, 613.

And every fact which the parties deem material to their respective rights, 537.

And every fact necessary to the materiality of instructions which are asked or refused, 659.

8. The bill ought to be prepared during the progress of the trial, 537.

The signing and sealing of the bill is a *ministerial* act, 537.

- But the settling of it is a *judicial* act, and cannot be delegated by the judge, 651.
- The judge is not bound to prepare the bill, 567.
- It is the duty of the excepting party to prepare his bill, submit it to his adversary, and if they cannot agree as to the facts and exceptions, the judge must settle the bill according to his recollection, 567.
- The judge is not bound to take notes of the trial, 567.
- It is the duty of the judge to sign a true bill of exceptions, when it is tendered to him, in compliance with the statute, 537, 651.
- He can impose no conditions upon the party praying his signature and seal, 651.
- If the judge refuses to sign and seal the bill, a mandamus will be awarded to compel him, 537, 567.

BILL OF EXCHANGE.

- The act of indorsing a bill of exchange to a bank, does not admit that the bank is a corporation, 47, 48.
- Where a bill is made payable at a specific place, payment need not be demanded there, in order to charge the drawer and indorser, 410.
- In an action upon a bill of exchange, where the declaration contains a special count upon the bill and the usual money counts, if the plaintiff attaches a copy of the bill to his declaration, it is unnecessary also to file a copy of an account, 423.

BILL OF SALE.

- An absolute bill of sale of chattels, where the possession remains with the vendor, is fraudulent *per se* as to creditors, 323.
- A bill of sale and a receipt for the purchase money, is only *prima facie* evidence, and may be explained by parol, 500.

BLANK INDORSEMENT.

- Where a note is indorsed in blank, a holder can recover upon it without any other evidence than the simple fact of possession, 564.
- Where there are two blank indorsees upon a note, upon a demurrer to evidence, in an action upon the instrument, the court will intend a joint indorsement, 564.
- A blank indorsement is within the control of the holder, and authorizes him at any time before, or upon the trial, to write his own name as indorsee over it, 680.

See also ASSIGNEE, ASSIGNMENT, ASSIGNOR, *and* PROMISSORY NOTES.

BONA FIDE HOLDER.

- A party to negotiable paper cannot, at law or in equity, impeach it, except in the case specified in the statute, when sued by a *bona fide* holder of it, 66, 246.

BOND.

Miscellaneous Points.

- In debt on bond, plaintiff must annex a copy to his declaration, or the cause must be continued, 31.
- Variance between the declaration and oyer as to date of bond, held fatal, 41.
- The fraudulent separation of the penal and conditional parts of a bond is not a criminal offence, 461.

Administration Bond—Vide ADMINISTRATORS, *etc.*

Arbitration Bond—Vide ARBITRATIONS *and* AWARDS.

Appeal Bonds—Vide APPEALS.

Attachment Bonds—Vide ATTACHMENTS.

Certiorari Bonds.

The dismissal of a writ of certiorari is equivalent to a technical affirmance of the judgment, and works a breach of the bond, 684.

In an action of debt upon such bond, the judgment is for the penalty to be discharged upon the payment of the damages assessed, 684.

Conveyance Bond.

Bond to convey land is not assignable at law, 182.

On a breach of a bond to convey, the measure of damages is the value of the land at the time the breach occurred, and not the consideration money and interest, 331, 611.

Delivery Bond.

In an action by the sheriff upon a delivery bond, it is unnecessary to prove the levy, where the suit was commenced by attachment—the judgment of the court in the attachment cause is conclusive upon this point, 268.

Where a delivery bond recites the issuing of an attachment and a seizure by the sheriff, the obligors are estopped from denying the recited facts, 268.

Bond of an Infant.

Is voidable only, 430.

Replevin Bond.

Debt lies on a, 489.

Requisites of declaration, 489, 668.

Form of assigning breaches, 489.

Sheriff's Bond.

A clerk of the circuit court, in receiving and filing a sheriff's bond, acts ministerially, and these acts may be consummated in vacation, 650.

A sheriff has 30 days, after notice of the receipt of his commission, to execute and file his bond, 650.

The simple duty of the court, in a case where a sheriff elect has executed and filed his official bond in vacation, is to approve or reject the bond, 650.

Supersedeas Bond—Vide AGENCY.

BOND FOR COSTS.

Under the statute of 1827, a bond for costs filed before the trial was in time, 27.

A non-resident who sues before a justice must give a bond for costs, 286.

So, where he commences an action in the circuit court, 387.

The bond must conform to the statute, 387.

And must be entitled in the cause, 387.

When entitled "*Same v. Same*," insufficient, 387.

When indorsed on the back of the declaration, it is sufficient, although it does not name the court in which the suit is pending, 413.

May be signed in the name of a law firm, 413.

Where a non-resident sues for the use of a resident, a bond for costs is unnecessary, 480.

A bond for costs written upon the same sheet, under a properly entitled *præcipe*, with a caption "*Same v. Same*," is a valid instrument, 486.

Security for costs may be signed by one partner in his firm name, 486.

BURGLARY.

Where an accused party pleads guilty to the charge of burglary, or other criminal offence, it is the duty of the court to receive the plea and sentence the offender, 281.

C

CANAL, AND CANAL LANDS.

At a public sale of canal lands, the canal commissioners possess no power to impose any other conditions upon bidders than those specifically mentioned in the statute, 451.

Where the canal commissioners sue a bidder at a public sale of canal lands, to recover the purchase money bid, they must in their declaration aver that the sale was *public*, and the defendant the *highest* bidder, 451.

The canal commissioners had power in 1839 to draw checks upon the Branch of the State Bank of Illinois at Chicago, 633.

Uttering and publishing as true and genuine a forged canal check upon said bank, is a criminal offence, 633.

Form of the indictment, 633.

CANCELLATION.

On a bill in equity to cancel notes, and enjoin a judgment rendered thereon, money paid upon the contract which constituted the consideration of the notes, may be refunded without a special prayer to that effect, 24.

CAPIAS AD RESPONDENDUM.

When the *capias* is quashed on motion, and the bail discharged for irregularity, the court must not dismiss the cause, but treat the *capias* as a summons, and proceed accordingly, 532, 687.

CAPIAS AD SATISFACIENDUM.

A *ca. sa.* is not void because it does not recite that it issued upon the oath of the plaintiff, 179.

A declaration for an escape from custody after an arrest under a *ca. sa.* need not aver that the plaintiff made the oath required by law prior to the issuing of the writ, 179.

If the sheriff returns *nulla bona*, when he might have made the money, and upon the faith of this return the plaintiff sues out a *ca. sa.* against the body of the defendant in execution, upon which the defendant is arrested, and afterward, by the consent of the plaintiff, is discharged from imprisonment—the *ca. sa.* arrest and discharge is no bar to an action against the sheriff for his prior neglect of duty under the writ of execution, 191.

A *ca. sa.* issued without the oath of the plaintiff is void, 289.

But if it is based upon the oath of an agent of the plaintiff, it is voidable only, 289.

CAPITAL CASES.

In capital cases, the prisoner stands upon all of his rights, and waives no irregularities because of his silence, nor can his counsel without his consent waive such rights, 62, 424.

The accused in a capital case has a right to be present when the jury render their verdict, in order to poll them, if he sees proper to do so, 62.

CAPTION.

The caption to an indictment is not a count, nor any portion thereof, 416.

Where there are two counts in an indictment, and the first is quashed on motion, the caption of the indictment remains undisturbed, and the second count is referable thereto, 416.

CASE, ACTION ON THE.

Lies for obstructing a public highway to the injury of a citizen, 299.

Lies against a constable who neglects or refuses to execute legal process, 301.

Lies for an injury to a riparian right, 528.

Lies for firing a prairie whereby another is injured, 626.

Vide also ACTION.

CASHIER.

The receipt of a cashier is evidence against the bank, 31.

Where a note is indorsed thus: "Pay to the order of N. H. Ridgely, cashier," the legal title vests in Ridgely, 593.

CAVEAT EMPTOR.

The rule of *caveat emptor* applies to a vendee or grantee of land who takes a *quit claim* deed, 166.

CERTIFICATE.

1. Authenticating the record of a sister State, 48.
2. Authenticating the statute of a sister State, 401.
3. Of purchase at a sheriff's sale, 99.
4. Under the fugitive slave act, 116.
5. Of the Register of the U. S. land office, 226, 273, 285.
6. Of marriage, 553.
7. Of a probate judge, 657.
8. Of the acknowledgment of deeds, *vide* DEEDS.

CERTIORARI.

I.—*Alleging Diminution of a Record, etc.*

In a proper case, where a technicality occurs, the supreme court will, upon a suggestion of diminution, award a writ of *certiorari*, with leave to amend, and upon return of the writ bringing up the amended record, the judgment will be affirmed, 105, 471, 615.

This writ lies where the record is *augmented* as well as *diminished*, 471.

The writ will be awarded after the commencement of the argument, 519.

To justify the award of the writ the transcript must be legally authenticated, 624.

When *improvidentially* issued, the writ will be *superseded*, 680.

II.—*To a Justice of the Peace, in the nature of an Appeal.*

Lies only where an appeal is allowed by statute, 314.

Where the statute *prohibits* an appeal, it will not lie, 315.

The petition should show that the judgment is unjust, and wherein that injustice consists, and also state a legal excuse for not appealing in the ordinary way, 470.

The absence of the plaintiff from the county, who had left a note with a justice for collection, and his ignorance of the fact that he had been defeated in an action upon the note, is not a good cause for granting the writ, 470.

Action on certiorari bond—*Vide* Bond.

CESSION.

A revolution, conquest, treaty, *cession*, or other act, cannot, without express terms, divest the rights of the owners or possessors of the soil, 148.

CHALLENGES.

To a juror for *cause* must be made before trial, *if known*, 263.

CHANGE OF VENUE.

Vide VENUE and DE BENE ESSE.

CHATTELS.

A registered servant is a chattel, 112, 130.

Bill of sale of chattels void unless accompanied by possession in vendee, 323.

Bill of sale, and receipt for the purchase money only *prima facie* evidence, and may be explained by parol, 500.

Caveat emptor applies to the vendee of a chattel, unless he took a warranty, or the vendor made false representations, 500.

The law as to warranties of chattels, 500.

CHICAGO.

Lease of wharfing privileges by the municipal corporation of Chicago must be attested by the seal of the city, 535.

CHILDREN.

Of a slave, cannot be held in bondage unless such claim is expressly sanctioned by law, 50.

CHRISTIAN NAME.

Records may be amended by correcting the christian name of a party, where there is anything upon the files of the court to amend by, 258.

Indictments must set forth the christian name and surname of injured parties in full, 396.

Mistake in christian name of the plaintiff must be pleaded in abatement, 535.

CHRONOLOGY.

The transcript of the record of the circuit courts transmitted to the supreme court, upon appeals, writs of error, etc., should be *chronologically* arranged, 403.

Dilatory motions must be disposed of chronologically, 110.

CIRCUMVENTION.

A note obtained by "fraud or circumvention" is void under the statute, 246.

Requisites of plea, 148.

CIVIL LAW.

The degrees of consanguinity, under our statute of descent, must be computed according to the rules of the civil law, 84.

CLAIMANT.

The claimant in a trial of the right of property cannot object to the legality of the execution under which chattels were seized, 499.

CLERKS.

Tenure of the office of clerk of the circuit courts under the old constitution—"good behavior," 298.

Can only be removed for causes prescribed by law, 298.

Duty of clerks where an appeal is taken from a justice before them, 431.

Clerk not bound to deliver transcripts to the State or private persons until his fees are advanced, 489.

Marriage license issued by the county clerk, evidence, 553.

The clerks of the circuit courts act *ministerially* in receiving and filing sheriff's bonds in vacation, 650.

CLIENTS.

A client is not bound to pay fees to his counsel who neglected the business intrusted to him and employed a substitute, 43.

The court will presume the authority of an attorney to appear for the client, 323.

If the attorney had no authority he is responsible to the client—*Vide* APPEARANCE.

CLOCK PEDDLER.

A clock peddler is one whose sole business it is to vend and exchange clocks, 569.

Proof that a person at one time sold two clocks is not evidence that he is a clock peddler, 569.

COLLOQUIUM.

The words "*he swore to a lie*" are not slanderous without a *colloquium* setting forth the circumstances under which the words were spoken, 10.

COMMENCEMENT OF ACTIONS.

The issuing of the process is the commencement of ordinary actions at law, 199.

The cause of action must *then* exist or the plaintiff cannot recover, 199.

Actio non relates to the time when the action was commenced, 264.

COMMISSIONERS IN PARTITION.

Their report will be set aside, on motion, if they have made an unequal, unfair, mistaken or fraudulent division of the property in question, 629.

COMMISSIONS.

The sheriff, in selling property under execution, can only charge commissions upon the sum of money actually realized, 195.

COMMON LAW.

In force in Illinois, 2, 46, 89, 146, 251, 440, 445, 505, 506.

COMMON, TENANCY IN.

Where a tenant in common sues for the conversion of a chattel by a stranger, he can only recover his undivided interest therein, 172.

COMMUNITY OF INTEREST.

In civil cases, where a community of interest and design is established between the plaintiffs or defendants to a cause, the acts and declarations of one of the plaintiffs or defendants is evidence against all of the plaintiffs or defendants, 166.

COMPETENT WITNESSES.

All persons are competent witnesses who are not parties to the record, who have sufficient understanding, and who are not disqualified by interest, crime, or want of a proper moral obligation to speak the truth, 200.

Vide also WITNESSES.

COMPLAINT.

Where a justice, without a precedent *complaint*, and without actual knowledge obtained by a view, issues a warrant against a citizen for a supposed criminal offence, he becomes a trespasser, 100.

COMPULSORY NON-SUIT.

The court cannot compel a plaintiff to become non-suited, 48, 441, 551.

But the court may direct the jury to find a verdict as in case of a non-suit, 310, 502.

Or the defendant may move the court to exclude the evidence from the jury, 441.

The supreme court may render a judgment as in case of a non-suit, 270.

COMPUTATION OF INTEREST.

In the trial of appeal cases where a justice has rendered judgment upon a note, the circuit court will compute interest upon the note and not the judgment, in case of affirmance, 265.

CONCLUSIVE EVIDENCE.

Whether a certificate under the fugitive slave law is *conclusive* or only *prima facie* evidence of the facts therein recited? 116.

A judgment rendered in a sister State is *conclusive* evidence of a debt, unless impeached for fraud, or a want of jurisdiction in the court rendering it, 164.

A verdict in a trial of the right of property is *conclusive* upon parties and privies thereto, 849.

CONDITION.

Separating the *condition* from the penal part of a bond is not an indictable offence, 46.
A conveyance of land upon condition that the grantee shall improve the property is valid, and will be enforced in equity, 659.

Such condition need not be expressed in the deed of conveyance, but may be established by a writing *aliunde*: *ex. gr.* by a letter of the grantee to the grantor, 659.

CONFESSION OF JUDGMENT.

- An attorney retained to defend a cause cannot confess a judgment and bind his client, 258.
 One partner cannot confess a judgment, and thus bind the firm, 403.

CONFIRMATION.

- Where an act of Congress authorized the governor of one of the Federal territories which had been ceded to the U. S., to examine and confirm the titles of the ancient settlers, his deed of confirmation is *conclusive* evidence of title, 149.
 A voidable estate may be confirmed, 149.
 The confirmor, when under a legal or moral obligation to make a confirmation, is *estopped* by the deed of confirmation from disputing the title of the confirmee, 149.
 A subsequent grantee of the confirmor is also, 149.
 Congress cannot nullify the confirmation of their agent, 149.
 Such confirmation cannot be impeached collaterally, 149.
 A government confirmation operates as a release of title, 149.

CONQUEST.

Vide CESSION, 148.

CONSANGUINITY.

- Under the statute of descent, must be computed according to the rules of the civil law, 84.
 The father and mother are related to their children in the *first* degree, 84.
 The brothers and sisters are related in the *second* degree, 84.
 The mother (the father being dead) is the heir of her son or daughter, 84.

CONSENT.

- Cannot confer jurisdiction over a *subject matter* of which the court, by law, has no cognizance, 24, 309.
 Alteration of a note by payee, with the maker's consent, renders note void, 183.

CONSIDERATION.

1. A sealed instrument imports a consideration, 294, 331.
 If there was none, the party impeaching it must plead and prove it, 331.
2. A promise without a consideration is void, 280, 253, 423, 659.
3. A *moral obligation* will sustain an *express* promise, 253.
 But will not raise an *implied* one, 253.
 Benefit or detriment to promisee a sufficient consideration, 599.
4. Executed and executory considerations discussed, 253.
5. A party to a deed may show by parol, in a court of equity, a different consideration from that expressed in the deed, in cases of fraud, mistake, etc., 659.
6. An illegal consideration is a good defence to a cause of action *ex contractu*, 235, 454, 535.
 But a judgment rendered upon an illegal consideration cannot be impeached, 535.
7. In a declaration by the assignee against the maker, the plaintiff need not aver a consideration for the assignment, 8.
8. A note or other instrument embraced within the terms of the statute is *prima facie* evidence of a consideration, 294.

The words "value received," are evidence of a consideration, 294.

9. The consideration of a note cannot be impeached in an action brought by a *bond fide* holder, 246, 482.

But where the holder had notice, when he acquired the title, of the consideration, etc., he takes and holds it subject to all equities existing between the original parties to it, 616, 625.

10. *Consideration of Promissory Notes*.—1. The statute permits three defences: *First*, no consideration; *second*, a total failure of consideration; *third*, a partial failure of consideration, 148.
 2. "No consideration" must be pleaded specially, 20, 294.
Inadmissible under general issue, 658.
The *onus probandi* is upon the maker, 294.
 3. A plea of failure of consideration must show wherein the failure consists, or it is bad on demurrer, 1, 5, 20, 52, 148, 532, 635, 640.
A plea which sets forth two distinct grounds of failure, bad for duplicity, 503, 532.
Where the allegations of fact are uncertainly stated, the plea of failure is bad, 503.
 4. A plea of *partial failure* sustained, 512.
 5. Pleas of *total failure* sustained, where the consideration was the sale of land and the title proved defective, 635, 640.
11. Where a note, upon its face, shows that it was given to secure a debt due by a *stranger*, and no consideration is expressed therein, the plaintiff must aver a consideration, 179.

CONSTABLE.

A justice of the peace may, in civil and criminal cases, where an emergency arises, appoint a constable *pro tem.* to serve the summons or warrant, 89, 432.

But he must indorse the appointment upon the back of the writ, under his hand and seal, 432.

A constable having an execution cannot enter upon land and levy the writ upon fruit trees standing and growing upon the premises, 142.

A constable who levies a void attachment upon chattels is liable as a trespasser, 345.

A constable is protected in executing process where the justice issuing it had jurisdiction, 449.

A constable who collects money due upon a judgment which is afterward reversed, is not bound to refund to the debtor, 449.

CONSTITUTIONAL LAW.

A constitution is the form of government instituted by the people, in their sovereign capacity, in which first principles and fundamental law are established, 132.

The constitution is the supreme, permanent, and fixed will of the people, in their original, unlimited, and sovereign capacity, and in it are determined the condition, rights, and duties of every individual of the community, 132.

From the decrees of the constitution there can be no appeal, for it emanates from the highest source of power—the sovereign people, 132.

Whatever condition is assigned to any portion of the people by the constitution is irrevocably fixed, however unjust in principle it may be, 132.

The constitution can establish no tribunal with power to abolish that which gave and continues such tribunal in existence. But a legislative act is the will of the legislature, in a derivative and subordinate capacity. The constitution is their commission, and they must act within the pale of their authority, and all their acts contrary to, or in violation of the constitutional charter, are void, 132.

- If the legislature have no power to pass an act, any number of repetitions of unconstitutional statutes, or acts beyond the pale of their authority, can never make the original act valid, 132, 133.
- The constitution of Illinois is to be regarded as a *limitation* upon the power of the legislative department, but must be treated as a *grant* of power to the *judicial* and *executive* branches of the State government, 533.
- Distinction between express and implied power discussed, 533.
- The power of the governor to appoint and remove officers of State discussed, 533.
- The Secretary of State holds his office during "*good behavior*," 533.
- Legislative construction of the constitution is entitled to respect, but is not obligatory upon the courts, 533.
- Where the constitution is plain and clear, *construction* is a dangerous argument, 533.
- The supreme court is the supreme arbiter as to all inferior courts upon questions of constitutional law, 533.
- Those clauses of the constitution of a *general* character, which confer power upon the legislative and executive departments of the government, and which distribute the inherent powers of the people amongst the several departments, are to be regarded simply as declaratory of *first* principles, and directory to the several departments, 533.
- An objection to the constitutionality of a law must be made at the earliest opportunity before legal or equitable rights have become vested under it, 454.

Particular Clauses Construed.

1. Taxation—poll tax, 112.
2. How process shall run—in name of the people, etc., 83.
3. Slavery—indentured servants, 129.
4. The elective franchise—aliens, 623.
5. Tenure of office—Secretary of State, 533.

Federal Constitution.

1. This (Federal) is a government law, and all legislative, judicial, and executive acts can be sustained only when supported by the constitution and laws of the country, 351.
2. Clause in reference to judicial proceedings of our sister States, 80.
3. Bills of credit, 235, 454.

CONSTRUCTION OF STATUTES.

- As a general rule, must be construed *prospectively*, 142, 181, 196, 345, 654.
- The arbitration statute construed *strictly*, 40.
- Penal statutes construed *strictly*, 569, 623, 677.
- Statutes authorizing sales of land by administrator to pay debts construed *strictly*, 340.
- Statutes authorizing sales of land for taxes construed *strictly*, 345.
- Statutes in behalf of ancient settlers *liberally* construed, 149.
- Statutes treating of persons or things of an inferior dignity, not extended so as to embrace superior persons or things, 181, 266.
- "Persons" not extended to governments, 283.
- Statutes to be construed *in pari materia*, 149.
- Intention* of legislature ordinarily to control, 149.
- History may be consulted in construing statutes, 149.
- A statute to be construed according to its spirit and the reasons upon which it was enacted, and not in reference to its *literal* interpretation, 197.
- And in doubtful cases, if by giving to a statute a literal interpretation, it will be the means of producing great injustice, and lead to consequences that could not have been anticipated by the legislature, courts are bound to presume that no such effects were intended, and give such a construction as will promote the ends of justice, 195.

Courts look to the language of the *whole* act, and if they find in any *particular clause* an expression not so large and extensive in its import, as those used in other parts of the statute, if, upon a view of the whole act, they can collect from the more large and extensive expressions used in other parts, the real intention of the legislature, it is their duty to give effect to the larger expressions, 549.

Where power is conferred upon an inferior court to be exercised in a particular manner, all other modes are excluded, 268.

Statutes giving appeals with a view to trials *de novo* must be construed *strictly*, 445.

Where a statute gives a remedy, but is silent as to notice, it is implied, 448.

Construction of a statute granting a ferry franchise, 672.

Statute of set-offs construed, 264.

Construction of *inclosure act*, 283, 448.

Statute of wills, descent, and administration, 142, 181, 197.

Statutes relating to appeals, 197, 445.

Conveyance act, as to registry of deeds, 654.

Relative to sheriffs and coroners, 205.

Relative to foreclosure of mortgages by *scire facias*, 197, 266, 496.

Relative to claim and possessory rights upon the public lands, 638.

CONSTRUCTIVE POSSESSION.

A *constructive* possession will sustain an action of replevin, 81.

CONTEMPT.

The violation of a submission which is made a rule of court is a contempt, and the wrong may be remedied by attachment, 40.

All courts have an incidental power to punish contempts against their authority or dignity, 166.

CONTINGENT OBLIGATION.

When a debt is barred by the statute of limitations, and the debtor promises to pay upon the happening of a certain *contingency*, the plaintiff must aver and prove that the event has occurred, 163.

CONTINUANCE.

The granting of a continuance cannot be assigned for error, 11.

Nor can the refusal of a continuance, 330.

Contra—under the statute of July 21, 1837, 641.

The party against whom the motion is made may admit the facts stated in the affidavit, and insist upon a trial, 330, 396.

But every fact and intendment must be taken as true, 396.

Where a continuance is moved for, on account of the absence of a witness who resides in a foreign county, the question of diligence will depend upon the fact that the fees of the witness accompanied the subpoena, 330.

A defendant is entitled to a continuance where a material witness is absent, and he has used diligence to obtain his presence or procure his deposition, 456.

Or where it is apparent from the facts that the defendant could not, by the use of ordinary diligence, secure his evidence, 456.

The courts will not, of their own volition, continue a cause, even where an affidavit for a postponement is on file—a motion to the court is essential to the hearing of such application, 486.

Therefore, the supreme court will not, on the hearing of an appeal or writ of error, grant a continuance, where the party demanding it has not called the attention of the inferior court to the point, 486.

An affidavit which conforms to the statute entitles the party to a continuance, 530.

When the subpoena is sent to a foreign county, where the sheriff's office is vacant there, and the process comes to the hands of the coroner, who upon search cannot find the witness because of his removal from the county, and his new residence is unknown, this constitutes ordinary diligence, and the cause will be continued, 531.

The difference between the common and statute law as to diligence, etc., 531, *note*.

Where the declaration is filed only twelve days prior to the term of the court, and the defendant's witness resides in a sister State, the cause must be continued, 456.

Where a subpoena for a material witness has been issued, and returned "not served," because of the absence of the witness in a foreign county, where he was attending a dying son, a continuance will be granted upon affidavit of the facts, 641.

All of the cases decided upon the construction of the statutes relating to continuances collated, 641, *note*.

The statute itself is recited, 641, *note*.

A party is not entitled to a continuance where it appears of record or upon the files of the court, that he has not used diligence to obtain the testimony of a material absent witness, 665.

CONTRACTS.

The *lex loci* prevails as to the validity and construction of a contract, 52, 147, 400, 644. Sister State laws must be pleaded, 52.

A Contract to be binding, must be *mutual*, 57.

A contract to pay public officers for performing their duty is void, 57.

A statute releasing a penalty due a county is neither an *ex post facto* law, nor a law violating the obligation of a contract, 68.

Oral evidence to change the terms of a written contract is inadmissible, 82.

But the time within which the contract is to be performed, may be proved by parol, 82.

A contract by the State to pay the public printer in "State paper," at its *specie value*, is not to be performed according to the will of the State agents, but the market value is the true legal test of value, 96.

An administrator cannot bind the estate by any contract, 107.

Slavery cannot exist by virtue of a contract in Illinois, 129.

Fraud vitiates every contract, 148.

Parties may legally submit a controversy to the decision of arbitrators, 161.

The laws in force when a contract is made form part of its obligation, 201.

The contract of a surety is to be construed strictly, 201.

Contracts made by a county, 241.

A party to a contract has no power to determine the extent of the obligation, 96, 241.

The construction of a written contract is a question of law, 249.

Where the payment of money depends upon the happening of a contingency, and the party entitled to the payment is prevented from performing the contract, no action lies for a breach until the contingency ought to have happened according to the letter of the contract, 249.

A judgment is a merger of the contract upon which it is based, 266, 400.

Definition of a mortgage contract, 266.

The vendee in a contract of purchase cannot enforce a specific execution without averring and proving a performance on his part, 387.

Where A. contracts to erect a mill for B., and partially performs, but is prevented from completing the job by the act of B., he may recover on a *quantum meruit*, 399.

The bond of an infant is merely *voidable*, 430.

And where the obligee relies upon a new promise, he must declare upon it, 430.

A vendee of land cannot rescind the contract, and afterward enforce a specific performance thereof, 473.

Where a vendee sues for and recovers judgment for the purchase money paid by him upon the contract, this is virtually a rescission of the contract, 473.

Part performance of a parol contract for the sale of land withdraws the agreement from the operation of the statute of frauds, 546.

What acts constitute a part performance, 546.

Where a party is prevented from performing a contract by the willful or negligent conduct of his adversary, he may recover the damages he has sustained thereby, though nothing has been done under the contract, except the making of preparations to execute it, 545.

The power of a corporation to contract cannot be questioned under the plea of *non est factum*, in an action of covenant, 551.

If a corporation has not provided a common seal, but have allowed their chief officer to affix his private seal as evidence of a contract, this is binding upon the corporation, 551.

Where A. takes a railroad construction contract, and sub-lets one section of the road to B., and B. agrees to conform to the original contract, he cannot recover of A. unless he avers and proves a compliance with both the original and sub-contracts, 589.

The term "*excavation*," in a railroad construction contract, is a term of *art*, and the opinion of engineers is admissible to establish its meaning, 589.

At law, time is regarded as of the essence of a contract, 635.

CONTRIBUTION.

One of several joint debtors cannot compel his co-contractor to contribute until he has paid the debt, 270.

Nor can he recover if he pays the debt before it matures, 270.

Where two or more persons are jointly indebted to a third person, either has a right to pay the debt, and call upon his co-debtor for contribution, 526.

The receipt of the creditor is evidence of the payment, 526.

CO-PARTNERSHIP.

1. What constitutes a co-partnership? 297.

2. Under what circumstances can one partner sue his co-partner, at law? 297, 654.

3. *Quære?* Where A., B. and C. agree to do a particular piece of work for D., each being entitled to payment for his *aliquot* share, does this constitute a co-partnership? 297.

4. The existence of a co-partnership is a question of fact, 297.

5. In a proceeding by *scire facias*, to foreclose a mortgage, the writ of *sci. fa.* should aver the christian and surnames of the mortgagees, and if they constitute a firm of co-partners, an averment that the mortgage was made to "A., B. & Co." is insufficient, 424.

6. After the dissolution of a firm, of which the payee has notice, a note given by one partner, in the name of the recent firm, is illegal and void, 464.

7. The admission of one, who is *jointly* charged with another, is sufficient in an action *ex contractu*, to establish a *co-partnership* against both defendants, when the other partner makes no defence of a personal character, 569.

8. Where partners sue in their firm name, upon a note, in an action of debt, it is unnecessary to prove either the partnership or the christian names of the individual partners, under the plea of *nil debet*, 585.

9. Where one firm sues another, and the whole evidence demonstrates that each were firms, under their restrictive co-partnership names, the *onus probandi* is upon neither party in the supreme court, 612.
10. One partner cannot sue his co-partner at law, unless the firm has been *dissolved*, a *final balance* struck, and an *express promise* to pay, is made by the debtor partner, 654.

COPY.

The *copy* of the instrument or account sued upon, in actions *ex contractu*, must be filed with the declaration, or the cause will be continued, 31.

The copy of the instrument or account sued upon is no part of the record, 220, 287.

Where a copy of the instrument sued on was filed with the declaration, but the declaration did not conform to either the copy or original, but, on the contrary, omitted material words, and a demurrer was sustained to the declaration, and the plaintiff amended his declaration and copy—*held*, that the defendant was not entitled to a continuance of the cause, 27.

Where the plaintiff counts upon a note, or bill of exchange, and adds to his *special*, the *common* counts—files a copy of the note or bill, but no copy of *an account*, and offers to stipulate that the note or bill constitutes his sole cause of action—it is erroneous to *continue* the cause on the application of the defendant, 410.

The same practice obtains where the plaintiff fails to offer a stipulation, 423.

Where a declaration is filed ten days before the return term of the process, but the plaintiff omitted to file therewith, a copy of the instrument or account sued on, and the cause was continued to a subsequent term, at which time the cause was *dismissed*, because of the omission to file the copy of the cause of action—*held*, that this was error, 545.

In order to justify the dismissal of a cause, for neglect to attach to the declaration a copy of the cause of action sued upon, in actions *ex contractu*, the defendant must first take a rule upon the plaintiff to file a copy in compliance with the statute, 545.

CORAM NON JUDICE.

The supreme court will not, upon the hearing of an appeal or writ of error, *remand* a cause, where the proceedings of the inferior court were *coram non judice*, 263.

Where an inferior court has no jurisdiction, its proceedings are *coram non judice*, 466, 550.

CORPORATIONS.

Where a private corporation sues to recover real property, or upon a contract, it must, under the general issue, produce its act of incorporation, 47, 48.

The act of indorsing a bill of exchange to a banking institution does not admit that the bank is a corporation, 47, 48.

A municipal corporation cannot accept a ferry franchise from the authorities of a county, 188.

A statute authorizing a county to grant ferry franchises to "*persons*," does not include the power to grant such franchises to municipal corporations, 188.

A corporation cannot sue and cause the process to be directed to and executed in a foreign county, unless the facts exist, and are averred, which justify such a proceeding, 504.

The practice act applies to *corporations* as well as *persons*, 504.

A lease made by a municipal corporation, unauthenticated by its common seal, is void, 535.

The mode of authenticating an act, pointed out in a charter of incorporation, must be strictly pursued, 535.

- Where a corporation is sued, the reports of its officers are evidence against the corporate body, if accurate and authentic, 551.
- The power of a corporate body to make a contract cannot be questioned under the plea of *non est factum*, in an action of covenant, 551.
- If a corporate body has no common seal, and its chief officer is in the habit of affixing to corporate documents his private seal, which has from time to time been recognized as valid by the members of the corporation, the instrument he seals will be treated as a deed, 551.
- Where a *private* act of incorporation is declared to be, and recognized afterward by the legislature, as a *public* act, the corporate character of the corporation cannot be questioned *collaterally*, 564.
- A demurrer to evidence, in an action by a corporation, does not put in issue their corporate character, 564.
- Where a note is the property of a corporation, but for convenience has been assigned to one of its officers, the action is properly brought in the name of the assignee, 593.
- An assignment of a note to "*A. B., Cashier*," of a banking incorporation, vests the legal title in *A. B.*, 593.
- If the parties defendant have a valid defence in law, they may plead it, averring the *real* and *nominal* interest, 593.
- A *foreign* corporation may sue in the courts of Illinois, 625.
- Quære?* Can a foreign corporation make a contract in Illinois? 625.
- Where the record is silent as to the place where a corporation acquired title to a promissory note, by indorsement, the supreme court will presume that the note was indorsed in Illinois, 625.
- Where the record is silent as to the locality of a corporation, the supreme court will presume that it is a domestic corporation, 625.

CORRUPTION.

- The corrupt acts of an officer, *ex. gr.*, a justice of the peace, are indictable, 263.
- If a justice corruptly causes an estray to be appraised before himself, he may be indicted and punished, 263.

COSTS.

- The supreme court *remanded* a cause, the question of costs to abide the event of the suit, 20.
- Bond for costs may be filed prior to trial, 28.
- This not the present law, 28, *note*.
- A surety for costs may be discharged, and another person substituted, to render the former a competent witness, 138.
- A defendant who appeals from the judgment of a justice of the peace cannot rule the plaintiff to give security for costs in the circuit court, 182.
- No judgment for costs can be rendered against an unsuccessful administrator, who sues in his representative character, 252.
- A non-resident who sues before a justice of the peace must give security for costs, 286.
- So must a non-resident plaintiff who sues in the circuit court, 387.
- Otherwise, where he sues for the use of a resident, 480.
- No costs allowed upon an issue in law, 338.
- Cost bond—*vide* "Bond for Costs."
- The State is liable for costs in civil cases, 489.
- Costs are taxed by the clerk of the court, 515.
- A question as to the waiver of security for costs, 622.

COUNSELOR—*Vide* "ATTORNEYS," ETC.

COUNTIES.

- County commissioners can only bind the county they represent, where they act as a court, 57, 242.
- But their contracts may be proved by parol, 241.
- The legislature has absolute power over counties, 68.
- A county cannot be guilty of *laches*, 221.
- A county is not liable for interest upon county orders, 221.
- A county order "for \$16.50, or its equivalent in State paper," is payable in coin, or its equivalent in State paper according to its market value, 221.
- Liable for services rendered by a physician to a pauper, at the request of the county commissioners, 241.
- A county treasurer cannot take a note for a debt due the county, 422.
- Nor can he assign the same, 422.
- The agents of a county could not, at common law, convey the real estate of the county, 440.
- But they may do so by statute in Illinois, 440.

COUNTS.

- When a declaration contains two or more counts, one of which is good, and the other or others bad, a demurrer to the whole declaration must be overruled, 38.
- But where a single count contains one good and one bad averment, and yet the count shows a good cause of action, the bad matter will be rejected as surplusage, and a general demurrer to the whole declaration or count will be overruled, 38.
- A *special* count on a note and the *common* counts may be joined in the same declaration, 220.
- A note or bill of exchange is admissible under the common counts, 416.
- The caption to an indictment is not a count nor a portion thereof, 416.
- Several counts may be joined in one declaration, 461.
- Several causes of action may be joined in one count, *ex. gr.* several promissory notes, 461.

COUNTY COMMISSIONERS.

- When county commissioners remove their clerk, the cause of removal must be of record, 22.
- County commissioners have no implied power, 188.
- The county commissioners' court is a court of record, 188, 242.
- But it is a mere creature of the constitution and laws, 188.
- Its jurisdiction is *limited* as to the subject matter, 188.
- And also as to the *mode* of exercising it, 188.
- They possess no jurisdiction in civil cases, 241.
- Their power to bind the county by contract, 188, 241.
- An oral contract of the commissioners is binding on the county, 241.
- May convey the real estate of county, 440.

Vide also "COUNTIES."

COUNTY ORDERS—*Vide* "COUNTIES."

COUNTY SURVEYOR.

A county surveyor is entitled to twenty-five cents, and no more, for each lot he lays out, surveys, and plats in a town or an addition thereto, 444.

COUNTY TREASURER.

Cannot take a note for a debt due the county, 422.

Nor can he assign such a note, if taken, 422.

COURTS.

Power to hold special terms, 23.

Power at a subsequent term, 48.

Power to instruct a jury, 147, 398.

Power of court to sentence a criminal who pleads guilty, 281.

Power of court to establish rules of practice, 534.

Power of court to grant or refuse new trials, 5, 11, 31, 99, 125, 142, 145.

Power of court over continuances, 6, 11.

Supreme court *jumps* at conclusions occasionally, 87.

Supreme court will modify a decree, 171.

Supreme court has two pair of eyes, 287.

Judgment of the court of a sister State, 2, 80, 467.

Jurisdiction of the supreme court, 14, 416, 467, 485-6, 487, 537.

Jurisdiction of circuit court, 215, 396, 575.

Jurisdiction of county commissioners' court, 22, 57.

Jurisdiction of municipal courts, 396, 488, 568, 571, 642, 668.

Jurisdiction of probate courts, 218.

Jurisdiction of justices' courts, 17, 19, 89, 96, 100, 467, 487.

Jurisdiction of equity courts, 24, 30, 41, 66, 78, 84, 91, 102, 119, 120, 126, 138.

When courts will take judicial notice of a fact, 226.

Duty of circuit court on change of venue, 413.

Terms of court, 2.

Power of court over infants, 11.

Power in assessing damages, 19, 30.

Court divided in opinion, 20.

Power to administer oaths, 23.

Power to quash executions, 38, 50, 111, 120.

Power in arbitrated causes, 40, 146.

Power to take causes under advisement, 41.

What constitutes the record of a court, 42, 48, 80.

Power to discharge a surety for costs, 138.

COVENANT.

When this action lies, 330, 551.

Pleadings in, 390, 551.

A covenant to perform personal service, not assignable, 200.

A deed containing mutual covenants, not assignable, 200.

Covenant to convey, 330, 611.

Evidence in, 551.

Construction of covenants, 249, 617.

CREDITOR.

One cannot, by his own voluntary act, make himself the creditor of another, 270.

Assignment for the benefit of creditors, 508.
 Receipt of the creditor, when evidence in actions for contribution, 526.
 Appropriation of payments by creditor, 612.
 Redemption of land sold under execution by a judgment creditor, 645.
 Bill by a creditor to set aside a fraudulent conveyance, 665.

CRIMINAL CONVERSATION.

In *crim. con.* causes, a marriage in fact must be proven, 446.

CRIMINAL PROCEEDINGS.

Must run in the name of "The People, etc.," 3.
 The indictment must be indorsed "*billa vera*," 62.
 In capital cases the prisoner stands on all of his rights, 62, 424.
 Liability of bail in criminal causes, 164.
 Change of venue in, 257, 413.
 In case of reversal—when cause will be *remanded*, 257.
 Grand jury in, 263, 600.
 Writ of error in, 311.
 Appeals in, 322.
 Larceny, 329, 392, 434.
 Assault with intent to murder, 121, 321, 569.
 Official corruption, when indictable, 263.
 No intendments ordinarily in, 392.
 Indictments, 396 (2 cases) 424, 554, 569, 590, 600, 633.
 Certainty essential in, 396.
 Riot, 413.
 Petit jurors, 424, 600.
 New trials, 424.
 Venire in, 424.
 Having in possession forging apparatus, 554.
 Having in possession forged bank bills, etc., 590.
 Variances, 590.
 Murder, 62, 424, 600.
 The trial in criminal causes must be public, 600.
 In capital cases the supreme court will fix the time of execution, in case of affirmance, 600.
 Forgery of a canal check, 633.

CRIPPLE

Throwing a cripple out of a wagon, and leaving him to take care of himself, during inclement weather, with intent to kill him, is an assault with intent to murder, if the design was felonious, 569.

CUMULATIVE REMEDIES.

Instances of, 298, 520.

CUSTODY.

Of slaves, 130.
 Of children, 304.

D

DAMAGES.

When they exceed *ad damnum*, plaintiff may enter a *remittitur*, 461.

Interest is the damage by way of penalty for the unjust delay of payment, 221.

The supreme court will render such judgment, on the trial of appeals, writs of error, etc., as the inferior court ought to have rendered, and assess the damages, without the intervention of a jury, 247.

Where damages are wrongfully assessed, the remedy is a re-assessment, a second inquest, or a new trial, according to the peculiar character of the case, 298, 300, 564.

Instructions given or refused upon an assessment of damages cannot be the basis of an appeal or writ of error, 461.

After a default, the defendant may cross-examine the plaintiff's witnesses, as to the measure of damages, 298.

When damages rest in *computation*, the court, or clerk under the direction of the court, may make the assessment, 110, 165, 210, 486.

When *unliquidated*, an inquisition in the presence of the court is proper, 30, 300.

Or a writ of inquiry may be issued to the sheriff. The sheriff may execute the writ in vacation, 300.

And anywhere in his bailiwick, 300.

An inquest necessary, in an action for money had and received, 30.

Reasons assigned for setting aside an assessment, or inquisition of damages, constitute no part of the record on appeal or writ of error, unless made so by a bill of exceptions, 300.

In action by indorsee against indorser of a note, the measure of damages is the amount paid for the note, 677.

Unliquidated damages growing out of the breach of the contract sued upon, may be set off in actions *ex contractu*, 417.

The principles applicable to the assessment of damages upon the condemnation of a public right of way, 542, 549.

Debt on a judgment against an administrator—devastavit alleged—default entered—no writ of inquiry necessary, 110, 165.

DE BENE ESSE.

Where the evidence of a witness is material, and the party desires to take his deposition *de bene esse*, an affidavit filed in the court where the cause originated, after an order changing the venue to another county, but before the removal of the record, is legal.

DE NOVO.

Appeal causes of a civil nature, from a justice of the peace, must be tried *de novo* in the circuit court, 265, 465.

So of appeals from the probate court, 585.

So of appeals from a justice in *criminal* causes, 491.

Statutes granting appeals, with a view to a trial *de novo* in the superior court, are to be construed *strictly*, 445.

DEBT, ACTION OF, ETC.

In debt on a note, *nil debit* is a proper plea, 20.

Contra, in actions of debt upon a record, 2.

In debt upon a bond, a variance between the declaration and oyer is fatal, 41.

- In this form of action a judgment sounding in damages is erroneous and must be reversed, etc., 105, 397, 668, 680.
- In debt upon a judgment, against administrators, alleging a *devastavit*, and a default is entered, no writ of inquiry is necessary, 110.
- A judgment is *conclusive* evidence of a debt, 164.
- Debt on judgment—plea *nul tiel record*—no question of variance can be determined by the supreme court unless the record is embodied in a bill of exceptions, 164.
- In debt on a judgment, no writ of inquiry necessary, 110, 165.
- A justice has jurisdiction in debt, where the sum claimed does not exceed \$100, 432.
- In debt on an arbitration bond, the declaration need not aver a *mutual submission*, 507.
- Debt lies on a replevin bond, 668.
- Form of the declaration in debt on a replevin bond, 668.
- When judgment may be corrected after *certiorari*, on suggestion of *diminution*, where the form of action is debt, and the judgment is for damages only, 105, 668.
- Debt against several—all served—the judgment must be against all or none, unless a personal defence is interposed by one, 508.
- A petition and summons is in form an action of debt, 680.

DEBTOR.

- It is not immoral or illegal for a debtor, in making an assignment, to prefer one creditor over another, where the debt is confidential, etc., 508.
- The rights of debtor and creditor in the application of payments made by the former to the latter, etc., 612.

DECLARATION.

- Copy* of instrument sued on must be filed with the declaration, or cause will be continued or dismissed, 28, 31.
- Demurrer to, where there are several counts, 38, 614.
- Declaration on bond—oyer craved—variance, 41.
- Declaration against a principal must aver *his* obligation, and not that of *his agent*, 104.
- Declaration must be filed ten days before return term, etc., 129.
- Declaration in slander, 147.
- Declaration in attachment causes, 163.
- Variance between writ and declaration, 164, 182.
- Declaration for an escape, 179.
- Variance between declaration and the evidence, 41, 147, 179, 413, 462.
- Declaration by payee who has indorsed a note, 180.
- Declaration on foreign judgment need not claim *interest*, 182.
- Omission of *ad damnum* cured by verdict, 192.
- Declaration for malicious prosecution, 200.
- Misjoinder of counts, 241.
- Scire facias* to foreclose a mortgage is process and a declaration, 299.
- Declaration *v.* a constable for neglect, etc., 301.
- Bond for costs indorsed on declaration, valid, 413.
- When amendment of declaration works a continuance, 454.
- When *time* of filing declaration is material on application for a continuance, 456.
- Declaration upon penal statutes, 481.
- Declaration by assignee *v.* assignor of a note, 614.

DECREE.

- Joint* decree in favor of several complainants, cannot be affirmed as to a part of them, 84.

A re-hearing *ipso facto* vacates the decree, 119.

As to the admissibility of a decree in the action of ejectment, 440, 441.

DEDIMUS POTESTATEM.

On return of a, the officer taking and returning the deposition must indorse upon the envelope in which the deposition is inclosed, the names of the parties litigant, 492.

But where one firm sues another, the rule is complied with by indorsing the respective firm names thereon, 492.

The commission may be directed to persons *and* officers, or *either*; but, if to the latter, their official character must appear in their return, 613.

DEEDS.

Must be delivered and accepted, 173.

Record of the deed not evidence of either fact, when opposed by the general history of its execution, etc, 173.

When grantor a competent witness, 173.

Sheriff's deed which misrecites execution inadmissible, 441.

When a written instrument which declares it is sealed, in fact has no seal attached, it is not a deed, 569.

Acknowledgment of deeds, 591, 596, 619.

Deed valid, though unacknowledged, 596, 619.

And unrecorded, 596, 619.

Its execution may be proved as at common-law, 596.

Effect of registering a deed, 654.

Deed to defraud creditors, 665.

Separating a condition from a deed is not criminal, 46.

A conditional deed of conveyance, 659.

DEFAULT.

Irregular when a plea in bar is on file, 31, 187, 392, 465.

So after a plea in abatement is filed, 31.

So where a demurrer is undisposed of, 459.

So where the sheriff's return is defective, 103, 263.

The plaintiff acts at his peril in taking a, 103, 344, 390.

Default irregular unless declaration is filed ten days before return term, 129.

Can a default be set aside at a subsequent term? 187.

Motion to set aside a, addressed to the discretion of the court, 264, 267, 454, 461.

And the decision thereon cannot be assigned for error, 264, 267, 454, 461.

After a default, defendant has no day in court, 298, 461.

Except to cross-examine witnesses on the assessment of damages, 298, 461.

Where defendant appears and agrees to plead on a given day, and fails to do so, his default may be entered after the time stipulated has expired, 310.

The supreme court has no *original* jurisdiction to set aside a default rendered in the circuit court, 342.

A default is irregular where *no* return appears upon the process, 344.

A recital in the record of service will not aid the omission, 344.

Where the default is entered on the same day that a plea appears to be filed, the judgment will be reversed, 390.

A remittitur may be entered after a default, 461.

When *equity* will relieve, after judgment by default, 522.

A default based on void process will be reversed, 548.

Assumpsit v. one—plea by one—no default can be entered until plea disposed of, 465.
Action v. two—no service as to one—default *v. both* erroneous, 648.

DEFINITION.

Of a mortgage, 266.

DELAY.

The mere delay of a creditor to sue his *principal* debtor, does not exonerate the *surety*, 126.

DELINQUENT TREASURER.

A notice of a summary motion against a delinquent State treasurer must be specific and certain, 188.

DELIVERY.

Delivery essential to the validity of a deed, 173.
 Also to a sale of goods under execution, 180.
 The oldest execution delivered to an officer binds the goods of the debtor, 180.
 Delivery of a deed to an agent is valid, 681.

DELIVERY BOND.

Action upon a, 268.
 Defendants estopped by recitals in a, 268.
 Plaintiff need not prove levy under an attachment, in action upon a, 268.

DEMAND.

Vendee of land must *demand a deed*, to put vendor in default, 82.
 The demand of the plaintiff determines in all cases when jurisdiction depends upon the *sum* in controversy, 165.

DEMURRER AT LAW.

Pleading over, a waiver of a, 18, 106, 110, 321, 330, 423, 524, 531, 548, 613.
 When continuance allowed, after a demurrer is sustained to the plaintiff's declaration, 31.
 And when disallowed, 27, 653.
 Several counts—one good—demurrer to whole declaration must be overruled, 38, 614.
 Surplus averments rejected, and demurrer overruled, 38.
 Variance on demurrer and oyer fatal to declaration, on a bond, etc., 41, 220.
 Demurrer to declaration on contract made by an agent, sustained because it omitted to show the legal liability, 104.
 Demurrer must be formal to a certain extent, 103.
 A demurrer which craves oyer must recite the instrument of which oyer is craved, 41, 103.
 A demurrer is a waiver of a dilatory motion, 110.
 A demurrer opens the entire file of pleadings, and must be sustained to the first pleading which is defective, 130, 330.
 Variance between writ and declaration cannot be reached by demurrer, 164.
 Demurrer may be sustained to a *scire facias*, to foreclose, where the writ omits to set forth the deed of mortgage, 197.
 A special demurrer must assign causes, 220.

- When a demurrer is improperly sustained to a good replication, the supreme court will reverse the judgment, remand the cause, with directions to overrule the demurrer, and proceed consistently with the opinion, 291.
- When a demurrer is sustained to a bad plea, plaintiff has his election to take nominal damages, or have a writ of inquiry, 311.
- Judgment on demurrer to a plea in abatement, 338.
- Demurrer to several pleas—one of which is good—overruled, 400.
- Demurrer overruled—demurrant, if he wishes to plead, must obtain leave to withdraw his demurrer, with liberty, etc., 411, 534, 622.
- Demurrer *in short*, by consent, treated as valid, 503.
- Duplicity may be reached by general demurrer, 516, 532.
- Uncertainty also, 516.
- Frivolous demurrer, 534.
- A demurrer must be disposed of before trying issues in fact, 548, 567.

DEMURRER IN EQUITY.

- Admits only such facts as are well pleaded, 672.
- Cannot supply omissions, 672.
- Or cure a defective title, 672.

DEMURRER TO EVIDENCE.

- Written, 555, 574.
- Ore tenus*, 294.
- Judgment on, 294, 555.
- When proper, 310.
- What it must contain, 555.
- Joinder in, 555, 574.
- Must state facts, 555.
- Intendments in favor of plaintiff, 564.
- Must be formal, 574.

DEPARTURE.

- A replication which departs from the declaration is bad on demurrer, 22.

DEPOSIT.

- All banks may receive money on, 31.

DEPOSITION.

- De bene esse*—vide “DE BENE ESSE,” 163.
- Where notice is given that a deposition will be taken before a particular officer, and he dies before the day named, the deposition may be taken before his successor in office, 163.
- A deposition is illegal where an attorney in the cause dictates the answer of the witness, 446.
- But the dictation will not be presumed, 446.
- An immaterial deposition, irregularly taken, no cause of reversal, 446, 612.
- Taken under a *deditus* must be indorsed with the name of the litigant parties, 492.

DEPUTY.

- Sheriffs must return process in the name of their principals, 102, 263.

DESCRIPTION.

In trespass, *de bonis asportatis*, 7.
In *detinue*, 293.

DETINUE.

An unusual form of action, 293.
Few rules of evidence applicable thereto, 293.
Great accuracy required in describing the property, 293.

DEVASTAVIT.

Under an old statute of Illinois, 96, 110, 120.
Now *unnecessary* in actions upon administration bonds, 231.

DEVISE.

Conditional, 318.
In fee, 318.
For life, 318.

DEVISEE—*Vide* 318.

DILATORY DEFENCES.

Must be interposed before the justice or they are waived on the trial of an appeal, 52.
So in trials of the right of property, 316.
So of dilatory motions made for the first time in the supreme court, 389.
Must be disposed of chronologically, 110.
A demurrer is a waiver of a dilatory motion, 110.
Infancy is not a dilatory defence, 465.
Need not be interposed until the declaration is filed, 568.

DILIGENCE.

By assignee against the maker of a note under the statute, 15, 20, 28, 38, 147, 423, 479, 613, 614, 618, 677.
Where a bank directory fail to use diligence in collecting debts due the bank in conformity with the requirements of the bank charter, this is no defence in an action against a surety of one of the bank debtors, 126.
In procuring witnesses, on a motion for the continuance of a cause, 456, 641.

DIMINUTION—*Vide* CERTIORARI, 105, 519.

DISCONTINUANCE, 86.

DISCRETIONARY POWER.

Exercise of, cannot be assigned for error in the supreme court, 5, 11, 26, 76, 166, 267, 338, 340, 439, 454, 466, 527, 622, 653.

DISMISSAL OF ACTIONS, ETC.

Of bills in equity, 30, 84, 314, 473, 522.
Of an attachment cause, 196, 464.
No bar to a second suit, 263, 653.

Equivalent to a non-suit in attachment causes, 196.
 Of a suit by a justice, 268.
 Of appeals from justices of the peace, 342, 450, 527.
 Costs on dismissal, 342.
 Of appeals to supreme court, 197, 472.
 Of a case at law, for want of a declaration, 545.
 Of a *certiorari* to a justice of the peace, 684.

DISTRESS FOR RENT, 350.

DIVISION OF OPINION.

When supreme judges are equally divided, the judgment stands affirmed, 187.

DIVORCE.

Practice in divorce causes, 304.

Vide also, "ALIMONY.

DOGS.

Liability of owner of ferocious dogs for damages done by them to sheep, etc., 348, 436.

DOWER.

In what estates the widow is entitled to, 333.
 Requisites of the petition, 333.
 Widow not entitled to dower in a preëmption right, 333.

DUPLICITY.

In pleadings, may be reached by general demurrer, 516, 532.
 In pleas of failure of consideration, 532.

E

EJECTMENT.

In this action, the plaintiff must recover on the strength of his own title, and not upon the weakness of the adversary right, 148, 173.
 Where both parties trace title to a common source, neither can dispute the origin or validity of the common title, 148, 665.
 This form of proceeding is in reality an action of trespass, superadding thereto an execution, whereby the prevailing party obtains the possession of the land itself, 173.
 The plaintiff must prove title, and a right to the possession, or a simple right of possession, 173.
 This is a possessory action, 173, 565.
 The judgment should describe the premises as specifically and certainly as the declaration designates them, 303.
 No default can be entered in this action, when a plea is on file; the plaintiff must try the cause *ex parte* before a jury, 392.
 Where the chain of title deduced by the plaintiff is defective, because of some missing link or links, the remedy of the defendant is to move the court to exclude the evidence, 441.

- A compulsory *non-suit* is improper in, 441.
 At common-law this was a *fiction* action, 565.
 The death of the lessor does not abate the suit, 565.
 Where an action of this character is commenced in the name of a deceased lessor (the fact being sustained by affidavit), the court will strike the deceased lessor's name from the declaration, 565.
 A general verdict in ejectment is sufficient at common-law, 565.
 Under such verdict the plaintiff takes possession at his peril, 565.
 And where the plaintiff takes possession of more than his recovery entitles him to, a writ of restitution will be awarded, 565.
 A judgment in ejectment is a recovery of the possession, without prejudice to the right, 565.
 When the tenant appears, enters into the consent rule, and pleads to the declaration filed against the casual ejector, a verdict and judgment thereon will be reversed, 591, 650.
 The proper practice is to file a new declaration against the tenant, when he appears and enters into the consent rule, 591.
 So where the tenant appears and enters into the consent rule, the plaintiff must file a new declaration, before proceeding to a default, or it is error, 650.
 No person should be made a lessor, unless he had, at the commencement of the suit, a subsisting title to the premises, 664.
 Where it appears upon the trial that the lessor has no such interest, the count, upon his demise, will be stricken out, 665.

EQUITY.

- Where a party has a legal defence, and an opportunity of making it, and neglects to protect his rights, equity will not relieve him, 41, 78, 91, 102, 119, 120, 138, 624.
 Exceptions to the rule, 91.
 All persons in interest, should ordinarily be made parties to a bill in equity, 76, 473.
 Remedy in cases of omission, 76, 473.
 An objection for want of proper parties is addressed to the discretion of the court, but the power must not be exercised arbitrarily, 98.
 One who seeks equity must do equity, 78, 213.
 Where a bill contains no equity, it will be dismissed, on motion, 84.
 And an injunction issued upon it will be dissolved, 102.
 Relief against justice's judgments, 84.
 Injunctions against judgments at law, 91, 102.
 A re-hearing granted, vacates the decree, 119.
 When an erroneous execution issues, equity will not relieve, 120, 183.
 Rules of decision the same in equity as at law, 126.
 Where a defendant has a good defence at law, but no evidence to support it, he should file a bill of discovery, 138.
 Equity will not compel a vendor to part with his title, until the purchase-money has been paid him, or where the contract makes the conveyance a condition precedent, 171.
 The supreme court will modify the decrees in equity of the circuit court, where the justice of the cause requires it, 171.
 Where an officer in the execution of the writ acts illegally or oppressively, the remedy is at law, not in equity, 183.
 An execution valid upon its face will not ordinarily be declared void by equity, for extrinsic causes, 183.
 Bills for a specific performance, 171, 213, 387, 473, 546.

In equity the allegations and proofs must correspond, 387.
 Practice in injunction causes, 522.
 Relief against judgments by default, 522.
 Replications, 522.
 Statute of frauds, 546.
 Answer of guardian *ad litem*, 546.
 Writ of error lies upon a decree, 624.
 Fraud should be specifically charged in equity causes, 624.
 Bill to foreclose a mortgage, 647.
 Mechanic liens, 647.
 Where the remedy at law is adequate, equity will not relieve, 120, 138, 183, 665.
 Bill to set aside fraudulent conveyance, 665.
 Demurrer in equity, 672.
 Bill to correct a mistake, 671.
Pro confesso decrees, 672.
 Reference to master, when necessary and when not, 672.

ERROR, WRIT OF, ETC.

Will not lie in tort, after death of *tort feasor*, 120.
 Nor on refusal to grant a new trial, 145, 188.
Contra—by statute, 434.
 Nor on an order granting a new trial, 532.
 Lies on all *final* orders, judgments, decrees, etc., 165, 403, 624.
 Quashing *supersedeas* does not affect the writ of error, 197.
 A writ of right, except in capital cases, 207, 488.
 A party cannot assign his own mistake as error, 210.
 Nor a ruling favorable to him, 210, 264, 297, 327.
 Lies upon a *pro forma* judgment, 231.
 Will not lie on order upon a motion to set aside a default, 267.
 Nor for giving an instruction which was not excepted to, 321.
 Will not lie to a decision overruling a continuance, 330.
 Will not lie where the rights of the plaintiff are not prejudiced by the decision, 327, 349.
 Error in *fact* cannot ordinarily be assigned, 389.
 No error will be regarded unless *specifically* assigned, 423.
 Nor one which contradicts the record, 446.
 Nor the decision on a motion to discharge bail, 466.
 When assignment of error is illegal, a demurrer is proper, 466.
 But if defendant joins in error, the court will, of its own volition, dismiss the writ, 466.
 Error cannot be assigned upon a collateral point, 466.
 The people cannot prosecute a writ of error in a criminal case, 466.
 A joinder in error cannot confer jurisdiction, 466, 467.
 The supreme court on error will enter proper judgment, when the record furnishes the rule of decision, 487.
 Error will not lie for refusing an amendment, 505.
 Nor upon refusal of a judge to sign a bill of exceptions, 567.
 Nor upon a question not made in the court below, 613.
 Lies upon a decree in *equity*, 624.
 Transcript must be authenticated in return to writ of error, 624.
 Will not lie to an order which is discretionary, 145, 148, 267, 466, 505, 532.

ESCAPE.

Declaration for an escape, 169.
When the action lies, 169.

ESTOPPEL.

Tenant estopped from disputing title of his landlord, 125, 251.
The government may be estopped in certain cases, 149.
Vendee in possession who fails to perform, estopped from denying the title of his vendor, 296.
Obligors in a delivery bond estopped by its recitals, 268.

EVIDENCE.

Relevancy of, 299, 595.
Remedy of defendant when evidence is insufficient, 310.
Admissible to show payment, not an extinguishment of a judgment, 467.
Immaterial evidence, no cause of reversal, 492.
Leading questions, 492.
Refusal of a pertinent question is error, 551.
Oral evidence admitted to prove a marriage, 553.
Admissions, 569.
Hearsay, inadmissible, 580, 657.
Rejection of relevant evidence, erroneous, 595.
Parol evidence inadmissible to prove the official character of a foreign justice, 596.
Negative will not overthrow *positive* evidence, 616.
Pedigree, how proven, 657.
Certificates of officers—*vide* CERTIFICATES.
To prove diligence in actions by assignee against the assignor of a note, 677.
Insolvency, how proven, 677.

EX PARTE PROCEEDINGS, ETC.

Great strictness required in, 496.
Definition of, 524.
Ex parte statements not the basis of relief in courts, 616.

EXCEPTIONS, BILL OF, ETC.

When a bill is *essential* upon writs of error and appeals, 42, 196, 300, 486.
When it lies, 99, 277.
An imperfect bill acted upon, 249.
No intendments indulged in to sustain a bill of exceptions, 440.
All facts upon which the point of error is based must be contained in the bill, 440, 537, 613, 617.
Where a new trial is granted and had, a former bill of exceptions cannot be used on error, 264.
Exceptions must be taken on the trial and before the jury is discharged, 277.
Bill not proper where a jury is waived, 277, 280, 310, 323, 343, 349.
Origin of bills of exceptions, 519.
Must be signed, 519.
And sealed, 519.
Mandamus lies to compel the signing and sealing of, 537, 567.
Signing and sealing of, a ministerial act, 537.
Settling of, a judicial act, 537.
Duty of counsel as to preparation of, 567.

EXECUTIONS.

Illegal execution quashed on motion, 38, 120, 467.
 Equity no jurisdiction to set it aside, 120, 183.
 Oppressive conduct of officer in executing not relievable in equity, 183.
 Obsolete statute as to indorsements upon, 22, 50, 119.
 Lien of executions, 180.
 Levy of executions, 183.
 Case lies for failure to execute, 191.
 Sheriff's commission upon sales under, 195.
 Error lies on motion to quash, 403.
 Notice of a motion to quash necessary, 460.
 When issued on a satisfied judgment, voidable, 467.
 Practice relative to costs upon, 515.
 Who may issue, after abolition of court, 549.
 When issued within a year, *alias*, *pluries*, etc., may issue from time to time, 632.

EXECUTIVE DEPARTMENT, 351.

EXECUTOR—*Vide* ADMINISTRATORS, ETC.

EXECUTORY DEVISE.

Definition of, 32.

F

FEDERAL GOVERNMENT.

Powers and duties of, etc., 351.

Vide also CONSTITUTIONAL LAW.

FEE BILL.

Analogous to an execution, 192.

FEES.

Sheriff's poundage, 195.
 County surveyor's fees, 444.

FEIGNED OR FICTITIOUS CAUSES.

Not entertained by the courts, 481, 544.

FERRIES.

1. Under grant from the legislature, 672.
2. Under grant from county commissioners, 188.

FINE.

Where a statute affixes a fine of \$10 for a misdemeanor, a fine of \$12 is illegal, 173.

FIRING PRAIRIES.

Case lies for, 626.
 Form of declaration, 626.

FLOAT.

Floating rights to public land construed strictly, 148.

FORCIBLE ENTRY AND DETAINER.

Construction of Illinois statute, 165, 398, 437.

Practice in this class of cases, 165, 398.

Appeals in—*vide* APPEALS.

By one tenant in common against his co-tenant, 437.

FOREIGN APPRENTICE.

Rights and duties of, 595.

FOREIGN CORPORATION.

Right to sue in our courts, 625.

Power to contract in this State, 625.

FOREIGN COUNTY.

When process may be sent to, 396, 463, 504, 567, 658.

Acknowledgment of a deed in a, 596.

Subpœna of witnesses in a, 330, 531, 658.

FOREIGN DEPOSITIONS—*Vide* *DEDIMUS and DEPOSITIONS*.

FOREIGN JUDGMENTS—*Vide* *JUDGMENTS*.

FOREIGN LAWS.

Must be pleaded and proved, 467, 492.

FORGERY.

Person whose name is forged a competent witness in a criminal prosecution against the forger, 23.

Where the forger is convicted, the legislature may release the penalty, 75.

Criminal prosecution for having in possession forging apparatus, 554.

Indictment for having in possession forged bank bills, with intent, etc., 590.

Forgery of a canal check, 633.

FORMS.

Of *scire facias*, to foreclose a mortgage, 496.

Of indictments for having in possession forging apparatus, 554.

Of indictments for an assault with intent to murder, 569.

Of declaration in case for firing prairie, 626.

Of indictments for forging a canal check, 633.

FRANCHISE.

A ferry privilege is a franchise, 188.

FRAUD.

In making an award, 161.

In a bill of sale, 323.

In chattel mortgages, 327.

Definition and characteristics of, 351.
 Notes obtained by fraud and circumvention, 482.
 In a vendor of land, 494.
 Fraudulent conveyance, 665.

FRAUDS, STATUTE OF.

Must be specially relied on, 546, 659.
 Part performance takes a case out of the, 546.

FREEDOM.

In Illinois, freedom presumed without regard to color or caste, 336.

Vide SLAVERY.

FUGITIVES FROM SLAVERY, 116.

G

GAZETTE.

The Gazette, or State paper, is admissible to prove the authenticity of an executive proclamation, 478.

GENERAL ISSUE.

1. The general issue admits the capacity in which the plaintiff sues: *ex. gr.*, where corporations or persons acting in a representative character sue, 220, 526.
2. *Technically*, there is no plea of the general issue, in the action of covenant, 390.
3. When the general issue is on file, it is error to enter a default; a jury must be empanelled and the cause tried *ex parte*, 392.

GOOD BEHAVIOR.

Tenure of office during good *behavior*, 298, 533.

GOOD FAITH.

In actions for malicious prosecution, 318.

GOODS AND CHATTELS.

1. Lien of execution upon, 180.
2. Delivery of, in case of judicial sales, 180.

GOVERNMENT.

Legal effect of a change of government, as to private rights, 148.
 Equitable duties of governments, 148.
 Government grants, 149.
 Presumptions against governments, 149.
 When a government is estopped, 149.
 How far governments are restrained by the constitution and the laws, 149, 351.

GOVERNMENT LAND.

Rights of squatters upon the public lands, 258.

Vide also SQUATTERS and PUBLIC LANDS.

GOVERNOR.

Title of the, cannot be tried collaterally, 46.
 Appointing power of, 46, 533.
 Power of, over the great seal, 401.
 Effect of proclamation of, 478.
 Proof of his official acts, 478.
 His power to remove officers, 533.

GRAND JURY.

Presumptions as to grand jurors, 263.
 Authority of, must appear in all indictments, 396.
 Its indictments must be indorsed *true bills*, 62.
 How and when to be empanelled, 600.

GRANT.

By governments, how construed, 148, 149.
 Of ferry franchises, how construed, 188, 672.

GRANTOR.

When a competent witness, 173.

GROSS NEGLIGENCE.

Case lies against a sheriff for, in reference to the execution of process, 191.

GUARDIAN.

Duties of a guardian *ad litem*, 546.

GUILTY.

Duty of court, where an accused party pleads "*guilty*," 281.

H

HABEAS CORPUS.

Power of supreme court to issue the writ, 291.
 Power of judges to award writ in vacation, 291.

HABERE FACIAS POSSESSIONEM.

Duties of plaintiff and sheriff in executing the writ, 565.

HEARSAY.

Evidence, inadmissible, as a general rule, 580, 657.

HISTORY.

May be consulted in construing statutes, 149, 350.

HOLDER—*Vide* PROMISSORY NOTES, 410.

HORSE.

A *mare* is a horse, 329.

HUSBAND—*Vide* WIFE, 333, 423.

I

ILLEGALITY.

Illegal acts of a court, 166.
 Illegal acts of a sheriff, 183.
 Illegal judgment, 301.
 Illegal acts of arbitrators, 303.
 Illegal contract, 454.
 Illegal bill of exceptions, 277.
 Illegal evidence, 166.
 Illegal acts of an attorney, 258.
 Illegal lease, 535.

IMMATERIALITY.

Admission of an *immaterial* deposition, no ground of error, 446, 612.
 Nor is the admission of any *immaterial* testimony, 492.

IMPEACHMENT.

When it lies against a judge, 166.

IMPLICATION.

Implied power, 188.
 Implied tenant, 251.

IMPRISONMENT.

When discharge from imprisonment by the consent of the plaintiff, no bar to an action for a prior default of the sheriff, 191.

IMPROVEMENTS.

Compensation for, under the occupying claimant or betterment law, 149.
 A promise by a *grantee* of the federal government to pay a squatter the value of his improvements is a *nudum pactum*, 253, 280, 394, 423.
 A purchaser of public land acquires title to the improvements thereon, 283.
 By the statute of Feb. 13, 1831, a settler may recover upon an *express* promise to pay him for improvements which he made upon the land, prior to the purchase of his promissor from the U. S., 458.
 A conveyance upon condition that the grantee shall improve the land granted, is valid, 659.

IN REM.

A tax upon real estate is *in rem*, and not against the owner, under the act of March 27, 1819, 30.
 A *scire facias* to foreclose a mortgage is a proceeding *in rem*, 197.
 An attachment against a vessel is also a proceeding *in rem*, 445.
 No appeal lies in proceedings *in rem*, unless the appellant has made himself a party to the original suit by appearance, etc., 445.
 An attachment against lands or goods of a debtor is a proceeding *in rem*, 496.

INCIDENTAL POWER.

Every court has an incidental power to punish for contempts of its authority, 166.
 The court of probate has an incidental power to revoke letters of administration obtained by *fraud*, 218.

INCLOSURES.

A case under the inclosure act, in reference to contribution for the expenses incurred by an adjoining proprietor in the erection of a partition fence, 448.

INDENTURE—*Vide* APPRENTICE.

INDENTURED SERVANTS, 311, 336.

INDEPENDENT COVENANT.

In cases where the covenant of the defendant is independent in its character, a simple breach constitutes a ground of action, and the plaintiff need not aver any act or offer on his part, 331.

INDICTMENT.

1. How time must be averred in an, 3.
2. Must be in the name of "The People," etc., 3.
3. Must be indorsed "*billa vera*," 62.
4. Objections to form of, must be taken on a motion to quash, 121.
5. Where an, contains two counts—one good, the other bad, a motion after conviction to arrest the judgment will be overruled, 121.
6. What are *formal* objections to an, 121.
7. Where a judgment of conviction is reversed, because of the insufficiency of the indictment, the prisoner will be discharged, and the cause will not ordinarily be remanded, 257.
8. Variance between indictment and evidence, 329, 590.
9. Indictment must recite the authority of the grand jury, 396.
10. Must set forth the christian and surnames of the injured parties in full, 396.
11. Practice on change of venue, where several are indicted and only one takes a change of venue, 257, 414.
12. The *caption* is no part of a count, 416.
13. Requisites of an indictment under our statute, 554, 590.
14. Precedents of indictments, 554, 569.
15. Indictment for murder, 62, 424, 600.
16. Indictment for an assault with intent to murder, 121, 321, 569.
17. Indictment for larceny, 329.
18. Indictment for riot, 3, 414.
19. Against a justice of the peace for corruption, 649.
20. For having in possession forged bank bills, with intent, etc., 590.
21. For having in possession implements for forging coin, with intent, etc., 554.

INDORSER.

Notice of non-payment unnecessary to charge the indorser of a note under our statute, 479.

Vide also ASSIGNOR, ASSIGNMENT, DILIGENCE, and PROMISSORY NOTES.

INDORSEMENT—*Vide* ASSIGNMENT, etc., and 180.

INDUCEMENT.

Where a record is set forth in a declaration by way of inducement, a slight variance is immaterial, 53.

INFANCY.

Is not a dilatory defence, 465.

How a guardian *ad litem* should answer a bill filed against infants, 546.

Minor apprentice, 595.

INFERIORITY.

Statutes which treat of *inferior* persons or things cannot be so construed as to embrace those of a *superior* dignity, 181, 188.

INHABITANT.

Rights of the ancient inhabitants of Illinois, 148.

Definition of the term "*inhabitant*," 623.

Under the elder constitution of Illinois an "*inhabitant*" was entitled to the elective franchise, 623.

INHERITANCE.

Words of, necessary to create a fee simple, 318.

A widow is only entitled to dower, in estates of, 333.

INJUNCTION.

1. By consent, an appeal will lie from an order dissolving an, 14.

2. What relief may be granted, upon a bill for an, 24, 66, 91.

3. When an, may be dissolved, 84, 91, 102, 522.

INQUEST—*Vide* INQUISITION.INQUIRY, WRIT OF—*Vide* INQUISITION.

INQUISITION.

A writ of inquiry to assess damages may be executed in open court, 19, 300.

Or by the sheriff in vacation, 300.

And at any place within his *bailiwick*, 300.

Unnecessary in debt upon a judgment, 110.

Or in any case where the damages rest in computation, 210.

When inquisition erroneous, the remedies of the defendant are—

1. To set it aside, 300;

2. Or move for a new trial, 300.

Instructions given to the jury of inquiry cannot be assigned for error, 461.

INSANITY.

Of a testator, how tried on appeal, 585.

Evidence of, in proving his will, 585.

INSOLVENCY.

Of the maker of a note when it matured, a good cause of action in a suit by the assignee against the assignor, 21, 614, 677.

What is insolvency, 147.

How proved, 147, 677.

If maker insolvent when a note is assigned, the assignor is liable to refund, 210.

INSTALMENT.

A *scire facias* to foreclose a mortgage payable by instalments must show that the last instalment has become due and payable, 424.

INSTRUCTIONS.

Must be based on the evidence, 210.

And not upon *abstractions*, 210, 327, 398, 617.

Court cannot instruct as to the *weight* of evidence, 147.

Nor can it direct the jury that there is *no* evidence, 297.

Must be positive, 166.

May follow the language of a statute upon which the cause of action or ground of defence is based, 251.

And if the statute is ambiguous, an *explanatory* instruction may be given, 251.

In an action of tort against two—no evidence against one—the court may direct the jury to find a verdict in favor of him who is not guilty, 502.

No exceptions can be taken to instructions given upon an inquest, after default, 461.

Must not be misleading, 210, 528.

The court must give instructions in the language of counsel, if they contain legal propositions, 549.

But the court may give explanatory instructions of its own volition, 549.

Plaintiff in error cannot assign for error an instruction which was favorable to his interest, 327.

Where an instruction is refused which lays down the law correctly, and the record fails to show that it was *abstract* in character, the supreme court will reverse the judgment, 327.

INSUFFICIENT RETURN.

A default based upon an insufficient return of a summons is illegal, and the judgment will be reversed, 263.

INTENDMENT.

When the supreme court will *disregard* the doctrine of intendment, 327.

No intendments in criminal causes, 392.

When the supreme court will act upon the doctrine of intendment, 446, 580, 612, 612, (two cases) 613, 625, 649.

INTENT.

Felonious intent in charges of larceny, 17.

Intent of a testator to prevail, 318.

Where fraud is the basis of an action or defence, the *intent* to defraud must be alleged, 494.

INTENTION.

To be regarded in the construction of statutes, etc., 149.

Vide also STATUTES.

INTEREST.

Upon a foreign judgment, 182.

A judgment is not regular, upon a *certain* cause of action, unless the interest is computed and made a part of the judgment, 182.

A judgment for the debt, "*with interest upon the amount*," is erroneous, 182.

Interest by way of *penalty*, 205, 481.

Definition of *interest*, 221.

Any rate of interest may be contracted for under the statute of 1833, 265, 266, 291.

On appeal from the judgment of a justice of the peace, the circuit court, in affirming such judgment, may render a judgment for more than \$100, if the excess is an accumulation of *interest*, 289.

A contract to pay \$3 per month interest, does not mean 36 *per centum per annum*, 291.

Interest on land contracts, under the statute of frauds, where the contract to pay interest is *verbal*, 329, 330.

Whether interest is barred by statute of limitations? 330.

Mode of declaring for, 182, 454.

Interest upon a *contingent* liability, 478.

Compound interest under a statute by way of *penalty*, 481.

Where a claim drawing interest is prosecuted before a justice, and the plaintiff claims no interest, the justice has jurisdiction, 487.

Where a suit is brought upon a foreign contract, and the declaration fails to allege the *lex loci* as to the rate of interest, the presumption is that the *lex loci* and *lex fori* agree, 182, 492.

Penal interest, under penal statutes, 205, 481, 520.

Interest is an incident to a debt, 182, 492, 596.

INTERLOCUTORY.

1. By consent of record, an appeal lies from an interlocutory order, 14.
2. The assessment of damages is an interlocutory proceeding, 461.
3. When an interlocutory decree will not be reversed, 647.

INTERPLEADER.

In vessel attachment causes, by parties in interest, 445.

INTERPRETATION.

A statute must be construed according to its spirit and the reason upon which it was enacted, and not with reference to its literal interpretation, 197.

Vide also CONSTRUCTION OF STATUTES.

INTESTATE.

Vide ADMINISTRATORS AND EXECUTORS, ADMINISTRATION, JUDGMENTS.

INTRUDER.

Improvements made by an intruder upon the public lands, 280, 284.

Vide also PUBLIC LANDS, IMPROVEMENTS.

IPSO-FACTO—*Vide* RE-HEARING.

IRREGULARITY.

1. Irregular *fi. fa.*, 120.
2. Irregular original process, 164, 303.
3. Irregular *ca. sa.*, 179.
4. Motion to quash irregular process is proper, 120, 164, 303.

5. Waiver of an irregularity, 226, 309, 439.
6. All irregularities reached by motion, 300, 303.
7. Irregularity in proceedings cannot be reached in collateral actions, 179.

ISSUE.

On pleas in abatement, 338.
 In fact, waives irregularities, 439.
 Must be tried by jury, 465.
 Unless a jury is waived by record, 465.

J

JEOfAILS.

Where parties go to a trial without a plea, the defect is cured by the statute of jeofails, 13.
 Technical objections cured by the statute of jeofails, 668.

JEOPARDY.

1. An accused party cannot be placed in jeopardy the second time for the same offence, 311.
2. For this reason the State cannot prosecute a writ of error in criminal causes, 311.

JOINDER IN DEMURRER.

Demurrer to evidence, the joinder must be *formal*, 574.

JOINDER IN ERROR.

1. Where an assignment of error is illegal, the proper practice is, for the defendants in error to demur, 466.
2. Where the defendant, instead of demurring to an illegal assignment, joins in error, the court will, of its own *volition*, dismiss the writ of error, 466.
3. A joinder in error cannot confer jurisdiction upon the supreme court, in a case where, by the constitution, they have no power to hear and determine the errors assigned, 467.

JOINDER OF PARTIES.

1. Where a judgment is rendered against several, all must join in a writ of error, 514.
2. Or one may sue out the writ of error, and summons, and serve his co-defendants, 514.
3. But one of several defendants or plaintiffs may appeal, 514.

JOINT AND SEVERAL CONTRACTS, AND JOINT TENANTS.

1. Under our statutes, the contract of several parties thereto is ordinarily joint and several, 52.
2. Where several are sued jointly, the judgment must be against all or none, 80, 508, 599, 648, 684.
3. Rights of joint tenants, 99, 437.
4. One of several joint debtors cannot compel contribution until he has paid the debt, 270. Nor can he pay it before the debt matures, and compel contribution, 270.
 The giving of a note for the joint debt by one of the joint debtors, is not a payment, 270.

Contribution may be enforced in a proper case, as between joint debtors, where one of them pays the debt, 526.

5. At common-law, in actions *ex contractu* against several, all must be served, or proceedings in outlawry had, before a judgment could be rendered, 506.
But by our statute, where one or more are served, and one or more are not, judgment may be rendered against those in court, and the plaintiff may then proceed by *scire facias*, to make those not served parties to the judgment, 506, 507.
Where judgment is rendered against all in such a cause, when all have not been served, the judgment of the inferior court will be reversed by the supreme court, 507.
But the supreme court, while they reverse the judgment, will remand the cause, with instructions to render judgment against the parties served, with leave to the plaintiff to proceed by *scire facias* as to those not served, 507.
6. When an indorsement by two may be regarded as joint, 564 (two cases).
7. An admission is sufficient to charge a joint defendant as partner, 569.
8. Where several defendants join in a plea of justification, the plea must be sustained as to all, 638.
9. Where two are sued upon a joint contract, and service is had upon one only, a judgment against both is erroneous, and must be reversed, 648.
But a judgment against the one served is regular, 668.

JOINT CRIME.

1. Where several are jointly indicted for a crime, either may change the venue, 257.
2. Effect of a change of venue, 257.
3. The State's attorney ought to write *separate* indictments, where the nature of the crime, committed *jointly*, will admit of a *severance*, 257.

JUDGE.

1. Duty of a judge, where an indicted party pleads guilty, 281.
3. Vacation power of the supreme court judges, 291.
3. Duty of a judge as to the settling and signing of bills of exceptions, 537, 567.

JUDGMENT.

1. Conclusive upon parties and privies, 164, 349, 454, 677.
2. Foreign, 2, 48, 164, 182, 467.
3. Domestic, of courts of record, 66, 84, 91, 138, 349, 454, 522.
4. Justices' judgments in sister States, 467.
5. Justices' judgments at home, 268, 289, 645.
6. Particular judgments:
 1. In ejectment, 303, 565, 591.
 2. In debt, 191, 397.
 3. In attachment, 396.
 4. In trial of the right of property, 349.
 5. Upon confession, 403, 645.
 6. Upon demurrer, 74, 130, 311, 411, 524.
 7. By default, 31, 103, 187, 310, 344, 390, 459.
 8. Against executors and administrators, 215, 251, 657.
 9. For costs, 20, 181, 251, 342, 515.
 10. Upon an agreed case, 50.
 11. Upon an award under the statute, 40, 146, 161.
 12. Of non-suit, 196.
7. Recitals in, 164, 344.

8. Arrest of, 104, 121, 659.
9. Power of legislature over, 68.
10. When cause of action merged in, 37, 400.
11. When court may take their judgment under advisement, 41.
12. Always rendered against the party who commits the first error in pleading, where either interposes a demurrer, 74, 130.
13. Where there are several joint debtors, 80, 86, 465, 508, 599, 648, 668, 684.
14. When, upon the reversal of a, the cause will be remanded for a new hearing, 105, 182, 400.
15. Action upon a, against administrators, 110, 181.
16. When a, is preferred under the law relating to intestate estates, 142.
17. When a foreign may be impeached, 164.
18. When an appeal lies from a, 165, 499.
19. When a writ of error lies upon, 207, 403.
20. In an action upon, when no inquisition to assess damages is necessary, 165.
21. Form of a, 166, 268, 400.
22. When the supreme court will not reverse a, 166.
When they will, 188.
23. When a junior judgment has preference, 180.
Lien of, 300.
24. Must be certain, 182.
25. May be affirmed in part, and reversed in part, 251.
26. When the supreme court will render a proper, 251, 291, 291, 668.
27. When a bar, 263, 268.
28. When a set-off, 264.
29. What is a, 166, 268.
30. Effect of an illegal, 301.
31. Verdict and judgment must be construed together, 317.
32. By court, when jury waived—conclusive, 323.
33. Assignment of, 449.
34. Imports absolute verity, 454.
35. Cannot be impeached collaterally, 454.
36. Satisfaction of, 467.
37. When *coram non judice*, 550.

JUDGMENT CREDITOR.

Cannot redeem under a void judgment, 645.
His remedy to compel a redemption, in a proper case, is by *mandamus*, 645.

JUDICIAL.

1. Of what facts a court will take judicial notice, 226.
2. Presumption in favor of judicial proceedings, 515.

JUNIOR PATENT.

A *junior* patent must give way, in a court of law, to an *elder* entry, 273.

JURISDICTION.

1. Of the supreme court, 165, 207, 291, 342, 403, 488, 499, 567.
2. Of the circuit court, 215, 266, 289, 340, 342, 397, 460, 461, 463, 504, 571, 658.
3. Of the municipal court of Chicago, 396, 488, 567, 568, 571, 668.
4. Of the county commissioners' court, 188, 241.

5. Of the courts of justice of justices of the peace :
 1. In actions upon an account, etc., 96, 165, 181, 279, 400, 477, 487.
 2. In penal actions, 207.
 3. In issuing a *ca. sa.*, 301.
 4. When an administration is a party, 309.
 5. In attachments, 345.
 6. In debt and assumpsit, 432.
 7. In trespass *de bonis asportatis*, 598.
6. In chancery—*vide* CHANCERY and EQUITY.
7. When a justice has no jurisdiction, he is a trespasser, 89, 301.
The jurisdiction of inferior courts, not of record, must affirmatively appear, 467.
8. The presumption is that courts of record, having a general jurisdiction, act within their authority, 642.
9. Executive officers protected when they act under the process of a court having jurisdiction, 179, 191.
10. Consent cannot confer jurisdiction over the subject matter, 309, 317.
11. Jurisdiction over the person, 645.
12. Where a court has no jurisdiction its proceedings are *coram non judice*, 87.

JUROR.

1. Formation of an opinion by a, 23, 446, 62.
2. Signing the verdict, 26, 499.
3. Cannot impeach his verdict, 31.
4. When disqualified by interest, 520.
5. Alien, 424.

JURY.

1. Misconduct of a, 5.
2. When their affidavits may be acted upon, 5.
3. Mode of swearing a, 11.
4. Waiver of a, 277, 310.
5. Province of a, to weigh the evidence, 458.
6. Mode of summoning a, 600.

JUSTICES OF THE PEACE.

1. No presumptions as to their jurisdiction, 467.
2. Must conform to the laws, 301, 645.
3. Their special jurisdiction :
 1. In criminal cases, 17, 491.
 2. In accounts, 19, 96, 165, 181, 199, 279, 477, 487, 649.
 3. In penal actions, 89, 207, 591.
 4. Where an administrator is a party, 309.
 5. In attachment, 345.
 6. In debt, 432.
 7. In assumpsit, 432.
 8. Under the inclosure act, 448.
 9. In forcible entry and detainer, 527.
 10. In trespass *de bonis asportatis*, 598.
 11. Over the person, 645.
 12. In arbitration causes, 651.
4. When liable in trespass, 17, 89, 100, 179.
5. Appeals from, 52, 84.
6. Suits before a, assimilated to bills in equity, 52, 126.

7. When his judgment is no bar, 253, 268.
8. Corruption in office, 263.
9. When bond for costs necessary in suit before him, 286.
10. When parties may be sworn before him, 288, 315.
11. Proceedings where there are several defendants, 289, 514.
12. His jurisdiction limited, 301.
13. On appeal, their judgments are tested upon the merits, 310.
14. *Certiorari* to, 314, 470.
15. Not a court of record, 514.
16. The pleadings *ore tenus*, 526.

JUSTIFICATION.

1. In arresting an alleged fugitive from labor, 116.
2. Of a constable in executing process, 179.
3. In malicious prosecution, 317, 318.
4. In slander, 612.

L

LACHES.

The State cannot be guilty of *laches*, 224, 249.

Nor can a county, 221.

Interest is based upon the doctrine that the debtor has been guilty of *laches*, 221.

Laches of a creditor, entitled to consideration, where he undertakes to enforce a *State* demand, 317.

LAND.

1. Liens upon land :
 1. By mortgage, 197—*vide also* MORTGAGES.
 2. By judgment—*vide* JUDGMENT, LIENS.
2. Bond to convey land, 331—*vide also* BOND.
3. Actions to recover land—*vide* EJECTMENT.
4. Injuries to land—*vide* TRESPASS.
5. Improvements upon—*vide* IMPROVEMENTS.
6. Public lands—*vide* PUBLIC LANDS.
7. Canal lands—*vide* CANAL LANDS.
8. School lands—*vide* SCHOOL LANDS.
9. Deeds for land—*vide* ACKNOWLEDGMENT, DEEDS.
10. Sheriff's sale of—*vide* SHERIFF'S SALE.
11. Location of, may be proved by oral evidence, 285.

LAND OFFICE AND LAND OFFICERS.

1. Certificate of land officers, 226, 285.
2. Decision of land officers, 351.

LANDLORD AND TENANT.

1. Tenant *estopped* from denying the title of his landlord, 125, 251, 296.
2. In actions of forcible detainer, the complaint should show the relations of landlord and tenant, 165.
3. The action of debt or assumpsit for use and occupation lies only where the relation of landlord and tenant exists, either expressly or by implication, 251.

4. Debt for use and occupation under the statute by landlord against the tenant, 251.
5. Rights and remedies of a landlord who levies a distress upon the goods of his tenant 350.
6. When the execution of a lease must be proven, 350.
7. Assumpsit for use and occupation, 503.
8. What facts must be proved to sustain an action for use and occupation, 251, 296, 503.

LARCENY.

1. Is a bailable offence, 23, 24.
2. By the finder of goods upon a highway, 145.
3. Variance between indictment and proof, 329.
4. Verdict for, must show the value of the thing stolen, 392.
5. A *felonious intent* necessary to constitute larceny, 434.

LAW AND FACT.

1. In criminal causes, the jury are the judges of the law and the fact, 263.
2. Where, in civil cases, the parties waive a jury and submit the law and fact to the court, the decision of the court is conclusive, 310.

Vide also BILLS OF EXCEPTIONS *and* ERROR.

LAW IN FORCE.

When a contract is made, the law in force at the time forms a part of the contract, as much so as if *recited* in the agreement, 201, 345, 401.
So, as to tax sales and deeds, 345.

LAWS—*Vide* COMMON LAW, STATUTES.

LEADING QUESTIONS.

When tolerated, 492.

LEASE.

1. Of saline lands, 50.
2. By a municipal corporation, 535.
3. When illegal, 535.
4. When its execution must be proved, 350.
5. When a *substitution* is illegal, 50.
6. When it must be sealed, 535.
7. A note given in consideration of an illegal lease is void, 538.

LEGAL ESTATE—*Vide* DOWER.

LEGISLATION.

Distinction between an ordinary act of legislation and a constitution, 180.

LEGISLATURE.

1. Has absolute power over counties, 68.
2. Has power to release penalties, 68, 75.
3. History may be consulted in construing the acts of the, 149.
4. Intent to control in construing the acts of the, 149.

5. Power of, over inferior courts, 298.
6. Power of, over rivers and other highways, 299.
7. Power of, over land titles, 351.

LESSOR.

1. Who may be made lessor, in ejectment, 664.
2. When his name may be stricken out of the declaration, 665.

LETTERS OF ADMINISTRATION.

May be revoked for fraud, 218.

Vide also ADMINISTRATION, ADMINISTRATORS AND EXECUTORS.

LEVY.

1. Trespass lies for making an illegal levy, 23.
2. An execution returned "*not levied*," is *functus officio*, 180.
3. What property must be levied on first, 183.
4. Debtor must exhibit his title to real estate, 183.
5. *Case* lies against an officer for not making a levy when the debtor had property, 191.
6. In an action upon a delivery bond, proof of a levy is unnecessary, if the bond recites one, 268.

LEX LOCI CONTRACTUS.

1. Governs the validity and construction of contracts, 52, 147, 400, 644 *and note*.
2. Must be pleaded and proved, 15, 492.

LICENSE.

1. To marry, 446, 553.
2. To keep a ferry—*vide* FERRIES.

LIENS.

1. Of a judgment, 300, 467, 654.
2. Of a mortgage, 197.
3. Of an execution, 180.

LIMITATION.

1. What promise is sufficient to take a case out of the statute of limitations, 138.
2. Such statutes to be construed prospectively, 196.
3. Effect of the repeal of such statutes, 196.
4. State not bound by such statutes, 224, 249.
5. Nor is a county, 224.
6. Construction of the statute limiting *debt* and *covenant*, 291.

LIMITATION OVER.

Of chattels, when valid, 323.

LOCATION.

Of land may be proved by *parol*, 285.

LUMPING TRADE.

A valid consideration for a promise, 321.

MAJORITY.

Executory devise, defendant upon the death of the first devisee before majority, 32.

MAKER.

Liability of the maker of a note, etc, 15, 20, 28, 66, 294.

Alteration of a note without the consent of the, 188.

Vide ASSIGNMENT, PROMISSORY NOTES.

MALFEASANCE AND MISFEASANCE.

1. Of a justice of the peace, 263, 649.
2. Of a constable, 301.

MALICIOUS PROSECUTION.

1. Declaration in, 200.
2. Requisites to maintain this action, 317.
3. General principles relating to, 317, 318.

MANDAMUS.

1. Lies to restore an officer who has been illegally removed, 22.
2. Does not lie to test the *title* of an office, 46.
3. Lies where there is no other *specific* legal remedy, 416.
4. Lies to compel an inferior court of record to grant a continuance, 416.
5. Lies to compel a judge to sign and seal a proper bill of exceptions, 537, 567.
6. Power of the supreme court to award the writ, in the exercise of its appellate jurisdiction, 22, 416, 537, 616.
7. When an alternative writ is necessary, 616.
8. Practice in mandamus causes, 22, 46, 416, 537, 567, 616, 645, 651, 681.
9. Lies to compel the execution of a sheriff's deed, after the expiration of the time limited for a redemption, 645.
10. Lies to compel the induction of the sheriff elect into office, 651.
11. A patent *improvidently* or *illegally* issued cannot be vacated by mandamus, 681.

MANDATE.

An officer is bound to obey the mandate of a writ directed and delivered to him, 179.

MARE.

Is a Horse, 329.

MARRIAGE.

1. Must be established in claims for dower, 333.
2. In *fact*, must be proven in cases of *crim. con.*, 446.
3. How proven, 446, 553.

MARRIAGE SETTLEMENT.

Of *personalty*, good, though *possession* does not follow the deed, 323.

MASTER.

And slave, 130, 311, 336.

And apprentice—*vide* APPRENTICE.

MASTER IN CHANCERY.

When a reference to is necessary, 672.

MATERIALITY.

1. Only material allegations must be sustained by proof, 210.
2. In a charge of perjury, 228.
3. Material witness, 456, 641.
4. Material questions of law, 485.

MATURITY.

A surety cannot pay a debt before it matures and call upon his principal for payment, 270.

MEASURE OF DAMAGES.

1. In an action upon a covenant to convey land, 331, 661.
2. In actions by an assignee against the assignor of a promissory note, 677.

MECHANICS.

1. Contract to erect a mill, 249, 399.
2. Contract payable in "mason work," 323.
3. Lien of, 647.

MEMORY.

Where a party *tampers* with a witness, and undertakes to *refresh* his memory, the fact is at least suspicious, 317.

MERGER.

A contract declared upon, is merged in, and extinguished by, the judgment which is founded upon it, 266, 409.

MILITARY RESERVATION.

Character and properties of a, 351.

Vide also RESERVATION *and* PUBLIC LANDS.

MILLS.

1. Contract to erect, 249, 399.
2. Injury to a *mill site* by backing water, etc., 523.

MINISTER.

Effect of his certificate in performing the marriage *rite*, 446.

MINISTERIAL ACTS.

What are, 537, 650.

MISDIRECTION.

Where a judge *misdirects* a jury upon a question of law, a bill of exceptions lies, 277.

MISFEASANCE—*Vide* MALFEASANCE *and* 249, 301.

MISJOINDER.

1. Of counts, 241.
2. Of parties, 484.

MISNOMER, 258, 338, 569.

MISTAKE.

1. A party cannot assign his own *mistake* for error, 210.
2. Clerical *mistakes* may be amended, 258.
3. Erection of a fence by *mistake* upon the land of another, 28.
4. Jurisdiction of equity to correct a, 671.

MODE AND MANNER.

1. Prescribed in a municipal charter must be followed, 188.
2. *Mode* of obtaining a note when evidence of fraud, 247.
3. *Mode* of serving process, 303.

MODIFICATION.

1. Of a decree, by the supreme court, 171.
2. Of a judgment, by the supreme court, 291, 397.

MONOPOLY.

Cannot be created by implication, 188.

MONEY COUNTS.

1. A promissory note is evidence under the, 416.
2. So of a bill of exchange, 423.
3. Waiver of torts under the, 598.

MONEY HAD AND RECEIVED.

1. On waiving a *tort*, 598.
2. Bill and note evidence of, 416, 423.
3. Writ of inquiry necessary in actions for, 30.
4. Plea of payment valid in actions for, 77.

MORAL OBLIGATION.

Defined, 253.

When the basis of a promise, 253.

MORTGAGE.

1. *Scire facias* to foreclose a, 9, 141, 197, 266, 299, 423, 424, 496.
2. Of personal property, 323, 327.
3. Bill in equity to foreclose a, 647.

MOTHER.

By the civil law, the mother is the heir of her son or daughter, 84.

MOTION.

1. A void writ may be quashed on, 3, 303, 394.
2. A plaintiff cannot quash his own execution on, 50.

3. A defective writ may be amended on, 83.
4. When courts will take notice of a defect, without a motion, 83.
5. A demurrer is a waiver of a, 110.
6. When a motion is unavailing, but a bill in equity necessary, 111.
7. When notice of a, necessary, 276.
8. Reasons for a motion, no part of the record, 300.
9. Dilatory motions not favored, 316, 389.
10. Motion for a continuance, 330.
11. Motion for a new trial, 424, 450.
12. To set aside a default, 454, 461.
13. To discharge bail, 466.
14. To quash an execution, 467.
15. To amend a declaration in ejectment, 565.
16. Requisites of notice in motions, 188.

MULATTOES.

Indentured, 336.

MUNICIPAL.

1. Corporations, powers of, 188.
When their acts illegal, 188, 535.
2. Municipal court of Chicago, 396, 488, 568, 571, 574, 575, 642, 668.

MURDER.

Cases relating to, 62, 424, 600.
Assault with intent to commit, 121, 321, 569.

MUTUAL COVENANTS.

A deed containing, not assignable, 200.

MUTUALITY.

A contract to be valid, must be mutual, 57.

N

NAKED POSSESSION.

1. In trespass *quære clausum fregit* a naked possession is a good title against an intruder, 284.
2. Where a party relies upon a naked possession, he is confined to his *pedis possessio*, 284.
3. In ejectment, possession alone, in the absence of a higher grade of title, is evidence of a fee, 173.
4. A *prior* possession, under a *claim of title*, will prevail in ejectment, against a *subsequent* naked possession, 173.
5. Possession of a promissory note by the payee is *prima facie* evidence of title, 180, 626, 649.
6. So, possession of such a note is *prima facie* evidence of title in the holder, 323.

Vide also POSSESSION.

NAME.

1. Christian name of appellant may be amended in the supreme court, where a *clerical* mistake occurs in the record of the judgment, 258.

2. A deputy sheriff must return process in the name of his principal, 263.
3. Where a declaration alleges that the defendant made his certain promissory note to the plaintiff, *Alexander* Tappan, and the note produced in evidence was payable to *A. H. Tappan*, and the plaintiff proved that *Alexander* and *A. H. Tappan* was one and the same identical person, and that the plaintiff was the holder of the note—*held*, that the evidence sustained the declaration, 390.
4. Declaration on a note made by *William Linn*—proof a note signed *Wm. Linn*—no variance, 413.
5. Bond for costs signed by co-partners in their *firm name* is valid, 413.
6. A *scire facias* to foreclose a mortgage should set forth the christian and surnames of the mortgagees, 424.
7. Declaration on a note payable to “*Williams & Lander*,” which describes the note as payable to the plaintiffs, who were the payees of the note, and who were described in the commencement of the narration as “*Schadrack Williams and Henry Lander*,”—on production of the note, *held*, no variance, 462.
8. Mistake in, or omission of, the christian names of the plaintiff can only be taken advantage of by plea in abatement, 585.
9. Where partners sue in their firm name, upon a note, it is unnecessary to prove the partnership or the christian names of the individual partners, 585.
10. In a petition and summons on a note signed “*J. M. Duncan*,” he is properly described as *J. M. Duncan alias James M. Duncan*, 676.

NAVIGABLE STREAMS.

1. The legislature have power to declare a stream navigable in law, 299.
2. The Sangamon River is a navigable stream, in law, 299.
3. Case lies for obstructing a navigable stream, 299.
4. In such action, it is no defence to show that the plaintiff would encounter other obstructions lower down the stream, 299.

NEGATIVE EVIDENCE.

The *negative* evidence of one witness cannot overthrow the *positive* recollection of another, 616.

NEGLIGENCE.

1. In equity, a complainant cannot have relief against a judgment at law, where he has neglected to make a proper defence, 41, 91, 111, 624.
2. Case lies against a sheriff for gross negligence in executing or failing to execute a writ of *fieri facias* to the injury of the plaintiff, 191.
3. Negligence of counsel is no excuse for non-compliance with a rule of court, or the requirements of a statute, 197.
4. Case lies against a constable for neglecting or refusing to serve a legal process, 301.
5. Negligence in the assertion of *State* rights, 317.
6. Neglect of duty by courts, 413.

NEGOTIABLE PAPER.

Rights of a *bonâ fide* holder of, 66.

Vide ASSIGNEE.

NEGROES.

Slavery of, in Illinois, 50, 112, 116, 129, 336.

Vide SLAVERY.

NEW PROMISE.

1. Of an infant, after arriving at majority, must be declared on, 430.
2. To pay a debt barred by the statute of limitations, 103, 138.

NEW TRIAL.

1. For newly-discovered evidence, 31.
2. Refusal to grant cannot be assigned for error, 99, 100, 125, 142, 145, 188.
3. Because verdict against evidence, 263, 658.
4. Affidavit of party evidence on motion for a, 424.
5. Refused where justice has been done, though errors intervene, 434, 612, 668.
6. Where damages wrongfully assessed, 564.
7. Proceedings pending a motion for a, 616.

NEWLY DISCOVERED EVIDENCE.

Motion for new trial because of, must give the names of the witnesses and the facts they will depose to, 31.

NEWSPAPER.

Publication of legal notice in, 460.
Publication of Governor's proclamation in—*vide* GAZETTE.

NIHIL.

Two returns "*nihil*," equivalent to personal service in writs of *scire facias*, 9.
Return must be technically correct, 102.

NIL DEBIT.

Error to render judgment in debt by default, when this plea on file, 516.

NIL DICIT.

Judgment of, 534.

NOMINAL DAMAGES.

In an action of covenant, plea of performance entitles plaintiff to nominal damages, when no evidence is offered to support the plea, 589.
On sustaining a demurrer to an insufficient plea, plaintiff may take judgment for nominal damages, or have a writ of inquiry, 311.

NON-ASSUMPSIT—*Vide* STATUTE OF LIMITATIONS.

NON CEPIT—*Vide* REPLEVIN.

NON EST FACTUM.

Effect of plea when not verified, 390, 520.
Effect of, when sworn to, 551.

NON-JOINDER.

Of parties defendant in actions *ex contractu*, must be pleaded in abatement, 477.

NON OBSTANTE VERIDICTO.

The supreme court will render a judgment *non obstante*, notwithstanding the question was not raised in the inferior court, 247.

NON-RESIDENT.

1. Attachment against the property of a, 163.
2. When a, sues before a justice, he must file a cost bond, 286.
3. Rights of a, under the statute of limitations, 291.
4. When a, sues in courts of record, he must give security for costs, 387.
5. Publication in equity against non-resident defendants, 460.
6. Where a, sues for the benefit of a resident, no security for costs necessary, 480.

NON-FEASANCE.

Case lies for the *non-feasance* of officers, 191, 301.

NON-SUIT.

1. A court of record cannot, at a subsequent term, set aside a judgment, and order a *non-suit*, 48.
2. A *non-suit*, in an attachment cause, is equivalent to the dismissal of the proceeding, 196.
3. If the plaintiff had no cause of action when the suit was commenced, the court may render a judgment *as in case of a non-suit*, 199.
4. Instance, where the supreme court reversed a judgment and entered one, *as in case of a non-suit*, 270.
5. When variances between pleadings and proof may be taken advantage of, by a motion for judgment *as in case of a non-suit*, 287.
6. Rule as to non-suit, where evidence of the plaintiff is insufficient in law to maintain the declaration, 199, 270, 310, 441.
7. Cannot be ordered where the evidence tends to prove the issue joined, 397.
8. A compulsory non-suit is illegal, 441, 551.
Where a link is missing in the chain of evidence, the defendant may move to exclude the evidence, 441.
Or to instruct the jury as in case of a *non-suit*, 502.
9. Where there are several defendants in tort, but no evidence as against one, the plaintiff cannot be *non-suited* as to the defendant against whom no evidence was offered, but the court may direct the jury to render a verdict for him, 502.
10. The plaintiff may submit to a *non-suit* at any time before the jury have *fully* heard the whole case, though they may have retired from the bar, 568.
11. Where the superior court refuse to permit the plaintiff to become *non-suited*, the supreme court, upon writ of error, will permit the proper judgment to be entered, without remanding the cause, 568.
12. A judgment of *non-suit* is no bar to a second action, 668.

NORTHWESTERN TERRITORY.

Construction of the ordinance of 1787 as to wills, 32.

Title to the territory, 148.

Treaties relating to, 148.

Land titles in, 148, 350.

Rights of the French settlers in, 148.

Construction of acts of Congress relating to, 149.

Slavery in, 50, 112, 116, 129, 336.

NOTICE.

1. Notice to agent, is notice to the principal, 24.
2. Notice in summary proceedings, 188, 316, 448.
3. Notice of a motion for a change of venue, 276.

4. Notice to adverse party of intent to use him as a witness in a suit before a justice of the peace, 315.
5. Where a statute requires notice to a party, notice to his attorney is insufficient, 315.
6. Notice to try the right of property, 316.
7. Surplusage will not vitiate a statutory notice, 316.
8. Notice essential in all judicial proceedings, whether the statute is silent upon the point or not, 448, 460, *and note*.
9. Notice under inclosure act, 448.
10. Notice of a motion to quash an execution, 460.
11. Notice by publication in a newspaper, 460.
12. Notice of the dissolution of a partnership, 464.
13. Notice of the non-payment of a note unnecessary, 479.
14. Notice of loss to the maker of an instrument unnecessary, 555.
15. Notice of a special term of court, 591.
16. Notice under the recording laws, 173, 327, 654.

NUL TIEL RECORD.

To debt upon a judgment, 164.

NULLA BONA.

Effect of such a return, 191, 614, 618, 677.

NULLIFICATION.

Congress cannot nullify or vacate a grant, 149.

NUNC PRO TUNC.

1. A lost *venire* may be filed by copy, after verdict *nunc pro tunc*, 424.
2. An attorney cannot be enrolled *nunc pro tunc*, 617.

NURSERY.

Are nursery trees a part of the freehold? 142.



OATHS AND AFFIRMATIONS.

1. How administered, 23.
2. Recital of oath of grand jurors in the caption of an indictment, 121.
3. Oath of arbitrators, when necessary, 161.
When not, 161.
When presumed, 161.
4. *Ca. sa.* must be based on, 289.

OBLIGATIONS.

1. Obligation of contracts under the constitution, 68.
2. When a bond does not conform to the statute, it may be treated as a common-law obligation, 146.
3. Equitable obligations, 148, 149.
4. A party to a contract has no power to determine the extent of its obligations, 241.
5. When a moral obligation is the basis of a promise, 253.

INDEX.

OBLIGOR.

When obligor estopped by the recitals of his deed, 268.

OBSOLETE STATUTES.

Construction of, 161, 181.

OCCUPYING CLAIMANTS.

Rights of, to improvements upon land, under the statute, where their title proves defective, 149.

OFFICERS.

1. Tenure of, under the constitution and laws, 298, 533.
2. Actions against, 23, 179, 183, 191, 289, 301.
3. Cannot act contrary to law, 149.
4. Power of a successor, 163.
5. Death of, effect of, 163, 281.
6. Corporate officers, their powers, 551.
7. Oppression of, 183.
8. Act at their peril, if they fail to perform their duty under a legal process, 199.
9. Presumption as to the performance of their duty, 681.

OFFICES.

1. Mode of testing title to, 46.
2. Power of legislature over, 461.

OFFICIAL BOND.

Construed strictly in behalf of *sureties*, 201.

OFFICIAL CHARACTER.

Where a *dedimus* is directed to an officer, his official character must appear in his return, 613.

ONUS PROBANDI.

1. In actions upon promissory notes, where a plea of "*no consideration*" is interposed, the *onus* is upon the defendant, 294.
2. A plea of *non est factum* sworn to, in actions of covenant, puts the *onus* upon the plaintiff, as to the execution of the covenant declared on, 551.
3. In causes between two partnership firms, 612.

OPEN COURT.

A writ of inquiry may be executed in, 19.

OPERATION OF LAW.

Effect of divesting title by, 173.

OPINION.

Does not constitute a warranty of chattels, 500.

OPPRESSION.

Where an officer, in the execution of legal process, acts oppressively, the remedy is at law and not in equity, 183.

ORAL.

1. Promise to pay the debt of another, void, under the statute of frauds, 34.
2. The time within which a written contract is to be performed may be extended by *parol*, 82.

ORDER.

1. Of court, appointing a *prochein ami*, 11.
2. County order, 221.
3. Of a court does not *ex vi termine*, mean a judgment, 268.
4. To sell real estate of an intestate to pay debts, 340.

ORDINANCE OF JULY 13, 1787.

Construction of, 32, 50, 129, 336.

ORE TENUS.

1. Demurrer *ore tenus* to evidence allowed, 294.
2. Pleadings before justices of the peace are always *ore tenus*, 526.

ORIGIN OF TITLES—*Vide* TITLES.ORIGINAL WRIT—*Vide* WRITS.

OUTLAWRY.

Proceedings in, 506.

OWNER, 251, 333.

OYER, 8, 41, 103, 196, 220.

P.

PARI MATERIA.

Statutes in *pari materia*, to be construed together as one entire statute, 149.

PAROL CONTRACT.

1. A parol promise to pay the debt of a stranger to the contract is void under the statute of frauds, 217.
2. A parol sale of land is only *voidable*, and not absolutely *void*, under the statute of frauds, 296, 659.
3. Part performance of a parol contract for the sale of land, withdraws the contract from the operation of the statute of frauds, 546.
4. What acts amount to a part performance? 546.
5. A vendee of land, under a parol contract to purchase, who refuses to perform his contract, is a tenant of the vendor, liable for use and occupation, and estopped from denying the title of the vendor, 296.

PAROL EVIDENCE.

1. A county surveyor can give *parol* evidence as to the location of a tract of land, 285.
2. A bill of sale of personalty may be explained by *parol* evidence, 500.

3. Where a deed of assignment of property, for the benefit of creditors, is in the possession or power of the party claiming under it, *parol* evidence of its contents is admissible, 508.
4. *Parol* evidence admissible to prove a marriage, 553.
5. Official character of a foreign justice cannot be proved by *parol*, where the statute points out a different mode of proof, 596.
6. A *parol* contract for the sale of land is not absolutely void, but may be proven, etc., in certain cases, 296, 659.
7. *Parol* evidence admissible to prove the insolvency of the maker of a promissory note, in an action by the assignee against the assignor of such note, under the statute, 677.

PAROL SALE.

Parol sale of land voidable only, 296, 659.

PART PERFORMANCE.

1. Of a contract, takes a case out of the operation of the statute of frauds, 546.
2. What acts amount to a part performance, 546.

PARTIES.

1. To a bill in equity, 76, 473.
2. Parties to a suit may arbitrate, 161.

PARTITION.

When report of commissioners may be set aside, 629.

PARTNERSHIP.

1. The individual promise of one of several partners, to pay a co-partnership debt, is valid, 53.
2. A debt due by one partner upon his individual account cannot be set-off in an action to recover a debt due the firm, 60.
3. What constitutes a partnership, 297.
4. When one co-partner may sue his co-partner at law, 297.
5. One partner cannot bind the firm by the confession of a judgment against the firm, 403.
6. A note by one partner for a partnership debt, given after the dissolution of the firm, of which the payee had notice, is void, 464.
7. Where partners sue in their firm name, upon a note in the firm name, it is unnecessary to prove either the partnership or the christian names of the individual partners, under the plea of *nil debit*, 585.
8. Where one firm sues another, and the whole evidence demonstrates that each were firms, under their respective co-partnership names, the *onus* as to the respective partnerships, is upon neither party in the supreme court, 612.
9. One partner cannot sue his co-partner at law, unless the firm has been dissolved, a final balance struck, and an express promise to pay is made by the debtor partner, 654.

PATENT.

1. A patent for land from the U. S. cannot be impeached *collaterally*, 149, 273.
The remedy is by *scire facias*, or *bill in equity*, 149, 681.
2. The elder patent is the superior title at law, 273.
3. A patent improperly issued cannot be vacated by *mandamus*, 681.
4. What constitutes a valid delivery of a patent for school lands, 681.

PAYEE.

1. A note is *prima facie* evidence that the maker borrowed the contents from the *payee*, 74.
2. Possession of a note by the *payee* is *prima facie* evidence of title, 180.
3. Alteration of a note by the *payee* renders it void, 188.
4. Possession of a note authorizes the *holder* to sue upon it, in the name of the *payee*, 323.

Vide PROMISSORY NOTES.

PAYMASTER-GENERAL.

Appointment of, 46.

PAYMENT.

1. Priority of, 181.
2. Contribution upon payment by one of several joint debtors, etc., 270.
3. Application of, 288, 612.
4. Receipt for a payment, effect of, 317.
5. Construction of a contract where the place of payment is fixed in the agreement, 410.
6. Of a judgment, 467.

PEDIGREE.

How proven, 657.

PEDIS POSSESSIO.

Where a party has no title, but relies upon a *naked* possession, he is confined to his *pedis possessio*, 284, 285.

PEDDLER—*Vide* CLOCK PEDDLER and 569.

PENAL STATUTES.

To be construed strictly, 569, 677

PENALTY.

1. The legislature may release a penalty due a county, 68.
2. So, the legislature may release a penalty in *qui tam* actions, 75.
3. A penalty is a punishment, 207.
4. A declaration for a penalty must set forth the specific grounds of the claim, 481, 520.
5. A penalty is not a *tax*, 591.

PEOPLE.

1. Cannot sustain a writ of error in a criminal cause, 311, 466.
2. Writs, etc., must run in the name of the, 83, 648.
But when an omission occurs they are amendable, 83, 648.
3. Criminal prosecutions must run in the name of the, 3.

PERFORMANCE.

1. Time of, in a written contract, may be extended by *parol*, 82.
2. When readiness to perform, no bar to an action upon a contract, 331.
3. Specific performance in equity, 337.
4. Prevention of, 545.
5. Part, under the statute of frauds, 546.

PERIL.

1. When an officer acts at his peril, etc, 179, 191.
2. When suitors act at their peril, 299.
3. Plaintiff in taking judgment by default acts at his, 344.

PERJURY.

What constitutes, 228.

PERPETUITY.

Words of, essential, in order to create a fee simple, 318.

PERSONAL PROPERTY.

1. A note for personal property is negotiable, 1.
2. Lien of execution upon, 180.
3. When an execution may be levied upon, 183.
4. Description of, in *detinue*, 293.
5. Bill of sale of, 324, 500.
6. Mortgage of, 324, 327.

PERSONAL SERVICE.

Two *nihil*s equivalent to, in writs of *scire facias*, 9.

PERSONS.

The word "*person*" in a statute does not embrace corporations, 188, 283.
Nor governments, 283.

PETITION.

1. For the assignment of dower, 333.
2. For a mechanic's lien, 647.

PETITION AND SUMMONS.

1. Amendment of, discretionary, 505.
2. A popular action, 517.
3. A speedy mode of proceeding, 517.
4. Intendments in favor of, 517.
5. Lies upon a note payable "*in good bank paper*," 517.
6. An action of debt, 596, 676, 680.
7. Lies upon a note under seal, 676.

PHYSICIAN.

A county employing a physician to attend a *pauper* are liable for his services, 241.

PLAINTIFFS.

1. Liable for acts of trespass, under a void writ, where he has notice of the irregularity, 87.
2. In ejectment, must recover upon the strength of his own title, 148.
3. In execution, not a necessary party to a bill in equity growing out of a levy in his name, 183.
4. His rights against an officer for neglect of duty in executing a writ, etc., 191.
5. Must have a cause of action when he *commences* his suit, 199.
6. Remedy of, where a sheriff, etc., fail to pay over money collected in his name upon execution, 205.

7. Where an oath is required of him, it cannot be made by his attorney or agent, 289.

PLEAS.

1. Of the failure of the consideration of a promissory note, must aver the precise manner in which the consideration failed, 1, 5, 148, 635, 640.

So in cases of *partial* failure, 512.

2. *Nil debit* is not a good plea to an action of debt upon a judgment rendered in a sister State, 2.
 3. Where a plea, either in bar or abatement, is on file, it is error to render a judgment by default, 31, 187.
 4. In trespass for illegally arresting an alleged fugitive slave, the plea of justification must show all of the facts which existed at the time the justice granted his certificate, 116.

The plea should also affirmatively show to whom the certificate was given—whether it was granted to the owner of the fugitive, or to his agent; and if to an agent, his name should be mentioned in the plea, 116.

5. A plea of fraud must specify the acts of fraud—a general allegation is insufficient, 148.
 6. *Vide* VARIANCE.
 7. A plea in abatement traversing the affidavit is valid in attachment causes, 196.
 8. When a demurrer is proper instead of a plea, 197.
 9. Material allegations, only, need be proved, 210.
 10. Several pleas—issue not joined—verdict cures the omission, 226.
 11. *Actio non* relates to the commencement of the action, and not to the time when the plea was filed, 264.
 12. To *scire facias* upon a mortgage, pleas of no consideration, or a total or partial failure thereof, are invalid, 266.
 13. Where a maker pleads “no consideration” to an action upon a note, the *onus* rests upon him, 294.
 14. A default is regular where a plea is not filed according to a stipulation on file, 310.
 15. Where judgment is rendered upon demurrer to an insufficient plea, the plaintiff may take judgment for nominal damages, or have a writ of inquiry, 311.
 16. Dilatory pleas must be pleaded at the earliest opportunity, 316, 389.
 17. A plea waives a demurrer to the declaration, 330.
 18. In covenant, where the covenants are independent, a plea of readiness to perform is insufficient, 331.
 19. Judgment on pleas in abatement, 338.
 20. Pleas denying the execution of a note must be verified by affidavit, 413.
 21. Where pleas are lost, defendant may plead *de novâ*, 465.
 22. Infancy is not a dilatory plea, 465.
 23. Duplicity in, 503, 516.
 24. Uncertainty in, 503, 516.
 25. Illegal plea may be stricken from the files, on motion, 534.
 26. Plea *puis darrien continuance*, 575.
 27. Plea of covenants performed admits nominal damages only, 589.

PLEADINGS.

Amendment of, discretionary, 449.

PLURIES.

Writ of execution, 515.

POSITIVE.

Affidavit must be positive, 259.

POSSESSION.

1. Replevin lies where the taking is from the *actual* or *constructive* possession of the plaintiff, 81.
2. Possession *alone*, in the absence of a *higher grade* of title, is evidence of a *fee simple*, 173.
3. A *prior* possession under a *claim* of right will *prevail* over a *subsequent naked* possession, 173.
4. The action of *ejectment* is a *possessory* remedy, 173, 565.
5. The plaintiff in ejectment must prove—
 1. Property in himself, and,
 2. A right of possession, 173.
6. Possession of a note is *prima facie* evidence of title thereto, 180, 323, 626, 649.
7. In trespass *quare clausum fregit*, possession is *prima facie* evidence against an intruder, 284.
8. Where a party to a suit relies upon a naked possession, he is confined to his *pedis possessio* or his actual inclosure, 284.
9. A vendee in possession of land, under an oral contract of purchase, who fails to perform his contract, is a tenant of the vendor, and is liable for the use and occupation of the premises, *and is also* estopped from denying the title of his vendor, 296.
10. An absolute bill of sale of chattels, where the *possession* remains with the vendor, is fraudulent *per se* as to creditors, 323.
11. Mortgages, marriage settlements, and limitations over, which provide for the retention of the possession by the mortgagor, settler, or donor, are valid in law, although the actual possession remains with the person who made the mortgage, created the marriage settlement, or limitation over, 323.
12. A mortgage is valid which stipulates that the possession of the mortgaged property shall remain with the mortgagee until the debt matures, 327.
13. But if, notwithstanding this *stipulation*, the property described in the mortgage is permitted to remain with the mortgagor, this is fraud *per se*, 327.
14. Effect of a writ of *habere facias possessionem* in the action of ejectment, 565.
15. A judgment in ejectment is a recovery of the possession, without prejudice to the right, 565.

POWER.

1. Of congress, 149.
2. Of the State legislature, 149.
3. *Absolute* power, 149.
4. *Incidental* power of courts, 166, 218.
5. Discretionary power, 166, 338, 340.
6. Implied and express power, 207.
7. Inherent power of a party to a contract, 241.
8. Statutory power, 340.

PRACTICE.

1. Construction of statutes relating to practice, 488.
2. Where a question of practice arises *collaterally*, and affects the title to land, the leaning of the court will be in favor of sustaining the title, 515.
3. The practice of a court is the law of the court, 534.

Vide ABATEMENT, CHANCERY, COURTS, EVIDENCE, PLEADINGS, *etc.*

PRÆCIPE.

1. A *præcipe* is a part of the *files* and *records* of the court, 486.

2. Words of reference in a paper, *subsequent* thereto, will be regarded in determining the rights of the parties to a suit, 486.

PRAIRIES.

1. Case lies for firing a prairie to the prejudice of a landowner, 626.
2. Form of the declaration, 626.
3. The statute relating to, 629.
4. Instructions in such an action, 626.
5. The duty of parties in case of fire, 626.

PRAYER.

Effect of the general prayer, in an equity bill, 24.

PREËMPTION.

1. No dower in preëmption rights, 333.
2. Under the laws of the U. S., 350.

PREJUDICE.

1. Change of venue, on account of, 276.
2. A party cannot assign for error a matter which does not *prejudice him*, 349.

PRESIDENT.

Powers of, in reference to the public lands, 351.

PRESUMPTIONS.

1. That public officers perform their duty, 681.
2. In reference to the regularity in a sheriff's sale, 53.
3. In the supreme court upon appeals and writs of error :
 1. As to issues in pleadings, 465.
 2. Where record contradicts the ordinary presumptions, 77.
 3. As to the fact, whether or not an arbitrator was sworn, 161.
 4. As to the regularity of proceedings of arbitrators, 303.
 5. As to the time of day when a plea was filed, 390.
 6. In support of the judgment of a justice of the peace, 477.
 7. In support of the judgment of superior courts of record, possessing a common-law jurisdiction, 567, 571, 642, 668.
 8. None indulged in to support the proceedings of courts of special jurisdiction, 448.
 9. None in behalf of foreign inferior courts, 467.
4. As to the approval of the sureties upon an appeal bond, 431.
5. In cases of freedom and slavery, 336.
6. As to the authority of an attorney to appear, 86, 323.
7. Against a government, 149.

PRIMA FACIE EVIDENCE.

1. A note is evidence of a loan of money, 74.
2. So is a mortgage, 74.
3. Certificate in fugitive slave cases is, 116.
4. A note is not, of a settlement of *anterior* claims or demands, 142.
5. Possession of a note is *prima facie* evidence of title thereto, 180.

6. A note is *primâ facie*, of a consideration, 294.
7. A sealed instrument imports a consideration, 294, 331.
8. A receipt is, of the facts recited therein, 317, 500.
9. Under the revenue law of 1827, a tax deed is not *primâ facie* evidence of title, 345.
10. Affidavit for a new trial is *primâ facie* evidence, 424.
11. Recital in a bill of sale is, 500.
12. Where a note is given for work and labor, after the completion of the work, this is *primâ facie* evidence that the payee performed his contract of service, 658.
13. A note made by the intervention of an agent is *primâ facie* evidence of a consideration had and received by the principal, 687.

PRINCIPAL.

1. A deputy sheriff must serve and return process in the name of his *superior*, 102, 263.
2. All agents must execute contracts in the name of their principals, 104, 197.
3. A declaration based upon a contract made by an *agent* must *affirmatively* show the obligation of the *principal*, 104.
4. *Delay* in suing a *principal* debtor does discharge the *surety*, 126.
5. In trespass, all *actors* and *accessories* are principals, 310.
6. Where two sign a contract, one as principal, the other as *surety*, both are *joint contractors*, 436.
7. *Vide ATTACHMENT and 464.*
8. *Vide PRIMA FACIE EVIDENCE, 687.*
9. Master not liable for willful act of his servant, 642.

PRIOR POSSESSION—*Vide Possession and 173.*

PRIORITY.

1. Of creditors in the administration of intestate estates, 181.
2. Of judgments, 181.
3. Of title, 278.

PRISONER.

1. In capital cases, rights of, 62.
2. Rights of, on the reversal of a conviction, 257.

PRIVATE RIGHTS.

Not destroyed by revolution, conquest, cession, etc., 145.

PRIVIES.

Bound by a judgment, 349, 677.

PRIVILEGE.

A ferry, is a franchise, 188.

PRO FORMA.

Error lies upon a judgment *pro forma*, 231.

PRO TEM.

When and how a constable *pro tem.* may be appointed, 432.

Vide also CONSTABLE.

INDEX.

769

PROBABLE CAUSE.

In case for malicious prosecution, 317, 318.

PROBATE COURT.

1. Power to revoke letters of administration, 218.
2. No power to render judgment in behalf of legatees or distributees, 268.
3. Appeals from, 339, 585.
4. Executions from, 499.

PROCEEDING IN REM.

What is a, 197.

PROCESS.

1. Return of, 102, 181, 263, 281, 303, 569.
2. Irregular, 164, 179, 389, 643.
3. Erroneous, 164.
4. Void, 179, 183, 289, 301, 345, 466, 548.
5. Voidable, 179, 289, 389.
6. Illegal, 179, 183, 389.
7. Oppressive execution of, 183.
8. Power of equity over illegal, 183.
9. Original, the commencement of the action, 199.
10. Alteration of, by an attorney, 258.
11. Duty of officer to execute, 289, 301.
12. Order of court awarding final, 299.
13. Defective, 299, 389.
14. Motion to quash, 164, 183, 299, 389.
15. Must be sealed, 303, 309.
16. Test of, 389.
17. Return-day of, 466, 548.
18. Appearance cures voidable, 643.
19. Regularity of, presumed, 649.

PROCEIN AML.

Whether order of court necessary, in appointing, 11.

PROCLAMATION.

1. Of the president, 351.
2. Of the governor, 478.

PROFERT.

1. Unnecessary, except in actions on sealed instruments, 8.
2. Effect of omission of, 31.

PROMISE.

1. A promise to pay a public officer for performing his duty is void, 57.
2. A consideration necessary to uphold a, 179, 253, 280, 394, 423.
3. Where an infant promises to pay a debt, after he arrives at majority, the action must be upon the new promise, 430.
4. A contingent promise is valid, 477.

PROMISSORY NOTE.

1. Plea of the failure of the consideration of a—
 1. Where the failure is total, 1, 20, 494, 532, 616, 635, 640.
 2. When only partial, 512.
2. Plea of no consideration, 20, 294.
3. Form of, 2, 97.
4. Declaration by assignee against maker, 8.

Assignee must use diligence by suit to recover of the maker, 15, 38, 614, 618, 677.

Unless the maker is absent from the State when note matures, 15, 28.

Or the maker is insolvent, 15, 210, 613.
5. Difference between ours and English statute relating to promissory notes, 15, 20.
6. Evidence of money loaned, 74, 416.
7. Not evidence of a settlement of anterior claims, 142.
8. Must be based on a consideration, 179.
9. Alteration of, 183.
10. No part of the record, when the foundation of an action, unless embodied in a bill of exceptions, 196.

Nor is a copy a part of the declaration, 220.
11. *Bona fide* holder of, 246, 482.
12. Note not evidence of money paid, etc., 270.
13. Evidence of a consideration, 294, 321.
14. Payable in *mason work* not assignable, 323.
15. Competency of assignor as a witness, 401.
16. Demand of payment unnecessary, etc., 410, 463, 479.
17. Variance between declaration and note, 413, 462.
18. Execution of, need not be proved unless denied by affidavit, 413.
19. Several indorsements of, 422.
20. To a public officer for a public debt, 422.
21. Illegality in consideration of, 454, 535.
22. A moiety of, not assignable, 456.
23. Maker and indorser cannot be sued jointly, 484.
24. Indorsement of, in blank, 564, 680.
25. Payable to an agent, 593.
26. Payable to an official, 596.
27. Guaranty of, 599.
28. *Lex loci* as to, 644.

PROOF—*Vide* EVIDENCE.

PROPERTY.

- What property is subject to execution, 112.
- What is exempt, 112.
- General policy of the law considered, 112.
- Definition of the word property, 182.

PROPRIETOR.

- The words "*owner and proprietor*" do not, in a petition for dower, import an estate of inheritance, 333.

PROSPECTIVE.

- Statutes not ordinarily construed prospectively, 181, 196.

PUBLIC HIGHWAY.

A navigable river is a public highway, 299.

PUBLIC LANDS.

1. Improvements upon, 52, 253, 280, 283, 394, 423, 458.
2. Agreement to attend a public land sale and bid for another is legal, 287.
3. History of the public land system in the northwest territory, 350.
4. Power of the federal executive over the, 351.
5. Rights of squatters upon the, 638.

PUBLIC OFFICERS.

1. A promise to pay public officers for performing an official duty is void, 57.
2. A public officer has no vested right in his office, 461.

PUBLIC SALE.

1. An agreement to attend a public land sale and bid in property for another is valid, 287.
2. At a public sale of canal land, the commissioners possess no power to impose any other conditions upon bidders than those specifically enumerated in the statute, 451.
3. Where the commissioners sue a bidder at a public sale of canal land, to recover the purchase-money, they must aver that the sale was *public*, and that the defendant was the *highest* bidder, 451.

PUBLIC STATUTES.

A private act of incorporation may be declared a public act by the legislature, 564.
Or it may be recognized as such by subsequent legislation, 564.

PUBLIC TRIAL.

An accused party is entitled to a public trial, 600.
What is a, 600.

PUBLIC WORKS.

Land damages awarded in the construction of, 542, 549.
Rule of assessing the damages, 542, 549.

PUBLICATION.

Of notice against non-resident defendants in chancery causes, 460.

PUIS DARRIEN CONTINUANCE.

What may be so pleaded, 68.
A release may be, 68.
May be filed any time before trial, 575.
Need not be sworn to, 575.
It is error to refuse a valid plea of, to be filed, 575.

PUNISHMENT.

For contempts, 166, 205.
Statute penalties are in the nature of punishments, 207.

PURCHASE-MONEY.

A justice has jurisdiction in a suit where an administrator sues to recover purchase-money bid at the administrator's sale, although the bid exceeds \$20, 309.

PURCHASER.

Rights of a purchaser of public land, 283.

At a tax sale, 345.

Bonâ fide, 654.

Q

QUANTUM MERUIT.

1. Where A. contracts to build a mill for B., and partially performs his contract, and is prevented from completing the job by the act of B., he may recover for his services upon a quantum meruit, 399.
2. Quantum meruit, under a statute, 458.

QUASH.

A party cannot, on motion, cause his own execution to be quashed, 50.

Irregular executions quashed, on motion, 120, 303, 394, 467.

Informal indictments may be quashed on motion, 121, 424.

Irregular *scire facias* cannot be quashed on motion—defendant must demur, 299.

Error lies on a motion to quash an execution, 403.

Capias ad resp. quashed when improperly issued, 532.

QUO WARRANTO.

The proper remedy to try title to an office, 47.

R

RATIFICATION.

Of the acts of an agent, 687.

REASONS.

Upon which a motion or other proceeding is based, form no part of the record, 300.

RE-ASSIGNMENT.

Of a note vests the title in the holder, 180.

RECEIPT.

Of a cashier, evidence against the bank, 31.

Is only *primâ facie* evidence of the facts therein recited, 317, 500.

In cases of contribution as between joint debtors, the receipt of the creditor that the money was paid by one of the joint debtors is evidence of the payment, 526.

RECITALS.

In a judgment, conclusive, 164.

In a delivery bond, work an estoppel, 268.

Of an order of court in administration deeds, not evidence—the order must be set forth at large, 340.

A recital in a record that the defendant was served with process is insufficient to authorize a judgment by default, 344.

Omission of recitals in attachment bond. 496.

RECOGNIZANCE.

A *scire facias* is necessary in order to enforce a forfeited recognizance, 286.
When surety upon a, is bound, 164.

RECORDS.

Variances in actions upon, 48, 103, 164, 318, 345.
In actions upon foreign judgments, the transcript of the record is not part of the case,
in the supreme court on appeal, unless made so by a bill of exceptions, 80.
Defective record in appellate court, 87, 173.
Oyer cannot be had of a record, 103.
Recitals in, 164.
Of a judgment, conclusive on parties and privies, 164.
Courts of record, 188, 241.
When record must be filed in appeal causes, 195, 197.
Note no part of record, 196, 287.
No error can be assigned which contradicts the record, 446.
Custody of records, when court abolished, 467.
Diminution of, 471.

RECORDING LAWS.

Construction of, 173, 327, 654.

REDEMPTION.

Of land sold under execution, cannot be redeemed by a creditor who claims under a
void judgment, 645.

REGISTER OF THE LAND OFFICE.

Certificate of a fact of record in his office is evidence, 226, 285.

REGISTERED SERVANTS.

Under the territorial laws and old constitution, 311, 336.

REGISTRY LAWS—*Vide* RECORDING LAWS.

REHEARING.

In equity, vacates the decree *ipso facto*, 119.

REJOINDER—*Vide* WAIVER.

RELEASE.

1. Legislative release of a penalty, 68.
2. A release may be pleaded *puis darrien continuance*, 68.
3. A government confirmation will operate as a release of title, 149.
4. The legislature may release a debt due to the State, 161, 197.
5. Under award, directing one to be made, 524.

RELEVANCY OF EVIDENCE.

The question whether evidence is relevant or not, depends upon the fact whether it
tends to prove the issue joined between the parties to the record, 299.

REMANDING A CAUSE.

When the supreme court will, upon reversal, remand a cause, 105, 263, 291, 327, 400, 503, 507, 508, 516, 522, 555, 567.

When proper judgment entered by supreme court, 182, 291, 400, 444, 463, 465, 467, 484, 487, 527, 568.

In criminal causes, 257.

REMEDY.

Quo warranto, proper remedy to try title to an office, 47.

Where an officer acts oppressively or illegally in executing process, the remedy is at law and not in equity, 183.

Against a sheriff who fails to pay over moneys collected under executions, 205.

Cumulative remedies, 298, 520.

Costs may be collected by execution or fee bill, 298.

When the law gives cumulative remedies for the same cause of action, a judgment in one form *unsatisfied* is no bar to the other form of action, 520.

REMITTATUR.

When verdict exceeds the *ad damnum* of the declaration, the plaintiff may enter a, 461.

REMOVAL.

Power of county commissioners to remove their clerk, 22.

Power of circuit to remove its clerk, 298.

Power of governor to remove Secretary of State, 533.

REPEAL.

The repeal of a statute does not affect rights which have vested under it, 196.

A public officer may be repealed out of office, where the office was created by the legislature, 461.

Repeal of a law establishing a court, 549.

REPLEADER.

Waives the prior pleas, 106.

Leave to replead necessary, 534.

Refusal of leave cannot be assigned for error, 622.

REPLEVIN.

Whether this action will lie for a slave? 50.

To sustain this action there should be an unlawful taking by the defendant from the actual or constructive possession of the plaintiff, 81.

Where a seizure is made under a void writ, the remedy is replevin, 499.

Non cepit puts in issue the taking only, and not the title of the parties, 550.

In replevin, the defendant avowed under an attachment directed to and executed by the defendant as sheriff of Morgan county—replication that defendant was not sheriff when attachment issued—on demurrer, the replication held bad, *non constat* he was sheriff when the *levy* was made, 650.

REPLEVIN BOND.

Debt lies upon a, 489.

Form of declaration, 489, 668.

Form of assigning breaches on, 489.

When equity will relieve against judgment on a replevin bond, 522.
Judgment on, 668.

REPLEVY OF EXECUTIONS.

Under an obsolete statute, 119, 161.

REPLICATION.

Waiver of a demurrer to, by rejoining, 18, 423.
When it departs, bad, 22.
Demurrer improperly sustained to, judgment reversed and remanded, 291.
Replication waives demurrer to plea, 321.
To plea in abatement, 338.
In equity, 522.

RES INTER ALIOS ACTA—*Vide* RECEIPT.

RESCISION OF CONTRACTS.

When equity will rescind, 24.
What amounts to the, by the acts of the parties, 473.
When vendor rescinds, he cannot afterward enforce the specific performance of the contract, 474.

RESERVATION.

Military, by the U. S. government, 351.

RESIDENT.

Is one who has taken up his permanent abode in the State. It must not be casual or temporary, 623.

RESPONDEAT OUSTER.

Judgment of, in pleas in abatement, 338, 687.

RESTITUTION.

In actions of ejectment, 565. .
In forcible entry and detainer, 527.

RESTRAINT.

Upon the governments of this country, 149.

RETROSPECTIVE.

Statutes will not ordinarily be construed retrospectively, 50, 142, 181, 196, 345, 468, 654.

RETURN OF WRITS, ETC.

When legal, 181, 496.
Can sheriff's, be contradicted? 187.
Deputy must return in name of his principal, 263.
A default based upon an insufficient return illegal, 263.
Must show when executed, 281, 282, 303.
Cannot be aided by parol, 281.
The return is the only evidence of service, 344.

Recital of service in record will not aid it, 344.

To a writ of *scire facias*, 496.

Appearances cures a defective, 496.

Amendment of, 615.

Rule to compel sheriff to return, 615.

RETURN DAY.

When illegal, writ void, 548.

REVENUE LAW.

Of 1827, how construed, 345.

REVERSAL OF JUDGMENTS.

1. The supreme court will reverse a judgment of the inferior courts of the State—
 1. Where there are several parties defendant, and the judgment was against one only, and the record fails to show a personal defence or other ground of severance, 86.
 2. In default causes, where any irregularity appears on the record, 103, 263.
 3. Where, in *debt*, the judgment is for *damages alone*, 105.
Exceptions to this rule.
 4. In a criminal cause where the indictment was substantially defective, 257.
 5. Where upon an abatement issue the pleadings are irregular, 338.
 6. Where the proper judgment is not rendered upon the issues of law or fact, 338.
 7. Where the court below had no jurisdiction, 448.
 8. Where the inferior court improperly refuses to quash an execution, 467.
2. When the supreme court will not reverse a judgment for apparent error—
 1. Where the complaining party stands by in the court below, and permits illegal evidence to be introduced without objection, 166.
 2. Where the inferior court *substantially* gave instructions as asked, 188.
 3. Where immaterial evidence was heard in the court below, which did not affect the merits of the case, 492.
3. The reversal of an illegal judgment is no bar to a second action for the same cause, 263.

REVOCATION.

The probate court has power to *revoke* letters of administration obtained by fraud, 218, 317.

REVOLUTION.

Does not divest private rights, 148.

RIGHT.

1. *Rights* are not affected by a change of government, whether such change is effected by revolution, conquest, cession or treaty, etc., 148.
2. Possession under a *claim of right* subverts a naked possession, 173.
3. *Right* of possession, as contradistinguished from a naked possession, 173.
4. *Right* of property, 200, 316, 349, 350, 450, 499.
5. Infringement of *rights* by legislation, 488.
6. Writ of error, a writ of *right*, except in capital cases, 488.

RIGHT OF WAY.

Assessment of damages for a, 542, 549.

RIGHT OF AN ACCUSED PARTY.

1. Cannot be waived in a capital case, 62, 424.
2. To a change of venue, 257, 413.

RIOT.

1. Requisites of an indictment for, 3.
2. Right of either to a change of venue, 413.

RIPARIAN RIGHTS.

1. Case lies for an injury to, 528.
2. What the rights of a riparian proprietor are, 528.

RIVERS.

1. Navigable rivers are highways, 299.
2. Power of legislature to declare a river, etc., navigable, 299.

RULES.

1. *Rules* of decision, same in equity as at law, 126.
2. A *rule* to plead, unnecessary in any case, 299.
The law fixes the rule day, and all suitors must take notice at their peril, 299.
3. *Rules* of evidence, the same in trials of appeals from the judgments of justices of the peace, as in the justices' court, 315.
4. The circuit courts have power to establish *rules* of practice, 534.
5. Rule upon officer to return process, 615, 680.

S

SALE.

1. Bargain and sale of land, 106, 166.
2. Sheriff's sale, 195.
3. Sale of lands of the U. S. by proclamation, 287.
4. Bill of sale of chattels, 323, 500.
5. Administrator's sales of real estate, 340.

SATISFACTION.

1. An execution issued upon a satisfied judgment is a nullity, and may be quashed, on motion, 467.
2. Evidence is admissible to show that the payment of a judgment by one of the defendants was not intended to extinguish the judgment lien, and the right to execute the same, 467.

SCHOOL COMMISSIONER.

Is the agent of the State, and purchaser in the sale of school land, 681.
The delivery by the auditor to the school commissioner of a patent for school lands vests the title in the purchaser without any formal delivery, 681.

SCIENTER.

In cases *crimen falsi* the *scienter* is the gist of the indictment or declaration, 590.

SCIRE FACIAS.

1. To foreclose a mortgage—

1. A recited note in the mortgage and writ is *prima facie* evidence that the transaction was based upon a "loan," 74.
2. Must run in the name of the "*People, etc.*," 83.
But the writ is amendable, 83.
3. Two *nils* equivalent to service, 9, 102.
Defective return of *nil*, 102.
4. Lies, though no express promise to pay is contained in the mortgage, 141.
Evidence *dehors* admissible, 141.
5. Is not an *action*, but a proceeding *in rem.*, 197, 299.
6. Defects in, the subject of demurrer, 197, 299.
7. No consideration, or failure of, cannot be pleaded in this action, 266.
8. Is a writ and declaration, 299.
9. Where husband and wife join in a mortgage, both are proper parties to the *sci. fa.*, 423.
10. Does not lie upon a mortgage payable in instalments, until the last becomes due, 424.
11. In this proceeding the statute must be strictly followed, 424.
12. The writ should set forth the christian names of mortgagees, 424.
13. Form of writ, 496.
14. Return upon writ, 496.

2. To make a party to a judgment, 86.

3. Lies to vacate a patent, 149.

4. Upon a forfeited recognizance, 286.

SEAL.

1. All process must be sealed, 303, 309, 394.
2. A seal imports a consideration when attached to a written contract, 331.
3. Mode of attaching the great seal of State, 401.
4. A constable *pro tem.* must be appointed by a sealed instrument, 432.
5. Attachment bond must be sealed by the principal and surety, 464, 648.
6. Debt lies upon a sealed note, 520.
7. Where a corporation grants a lease, it must be under the corporate seal, 535.
8. When a corporation has no seal provided, a contract under the seal of its chief officer sufficient, 551.
9. A statement in a written instrument that it was sealed, but the seal was omitted, does not make it a sealed instrument, 569.
10. A transcript from an inferior court of record must be sealed, 624.
11. Where no seal is provided by law for sealing the writs and process of a court of record, the private seal of the court is sufficient, 642.
12. Petition and summons lies upon a note under seal, 676.

SEIZIN.

Of husband, in dower cases, 333.

SECRETARY OF STATE.

Cannot be compelled by mandamus to affix the great seal to an illegal commission, 47.

Power of governor to remove, 533.

SECURITY FOR COSTS.

1. Bond for costs may be filed at any time before trial, 27.

Contra—before the institution of the suit, 28, *note*.

2. Where a defendant in a justice's court appeals, he cannot *rule* the plaintiff below to security for costs, 182.
3. A *non-resident* prior to the institution of a suit in our courts must file a bond for costs, 27, 182, 387.
But when a non-resident sues for the use of a resident, no bond necessary, 480.
4. The bond must conform to the statute, 387.
5. The bond must be entitled in the cause, 387.
6. When written upon a paper entirely disconnected with the other papers filed in the cause, and the bond is entitled *Same v. Same*, it is insufficient, 387.
But when upon the back of the declaration, or following the *præcipe* on the same sheet, it is legal, 413, 486.
7. May be signed in the name of a law firm, 413.

SENIOR ENTRY.

The elder entry prevails at law, 273.

SERVANT.

Indentured and registered, under the ordinance of 1787, the territorial laws of Indiana and Illinois, and the *original* constitution of Illinois, 50, 112, 116, 129, 311, 336.

SERVICE OF PROCESS.

Service of process, 281, 282, 314, 344, 503, 569, 617.

SET-OFF.

1. A judgment recovered after the commencement of the action cannot be pleaded by way of set-off, 264.
2. What constitutes a legitimate set-off, 297.
3. A defendant, when sued is not bound to plead a set-off which is then due him, 298.
4. Set-offs before justices of the peace, 315, 532.
5. Unliquidated damages arising out of a breach of the contract sued upon may be set-off, 417.

SETTLEMENT.

1. A note is not, *primâ facie*, a settlement of all anterior demands existing between the parties, 142.
2. Settlement upon the public lands, 52, 149, 253, 280, 283, 350, 394, 423, 458.
3. *Lumping* settlement of accounts, 321.
4. History of settlements upon the public lands in the Northwest Territory, 350.

SHERIFF.

1. Acknowledgment of a deed by a, 97.
2. To establish title under a sheriff's sale of land, the party claiming under the sheriff must show—
 1. A judgment, 99.
 2. An execution, 99.
 3. A deed, 99.

A certificate of the sheriff's sale is not evidence of title, 99, 441.
3. The deputies of a sheriff must execute and return their writs in the name of their principal, 102, 263.
4. Return of sheriff upon process, 102, 181, 308.
5. Rights of, when making a levy, 183.

6. Liable for oppressive conduct, 183.
7. Bill in equity to restrain a sheriff, 183.
8. Can a sheriff's return be contradicted? 187.
9. Case lies against a sheriff for negligence in the performance of his duty under writs, etc., 191.
10. Fees of sheriffs, on sales, 195.
11. Remedies and penalties against sheriff for a failure to pay over moneys collected by him under execution, 205.
12. Action by sheriff upon a delivery or forthcoming bond, 268.
13. Rule on sheriff to return process, 615.
14. Amendment of his return, 615.
15. A *mandamus* lies to compel a sheriff to execute a deed for land sold under execution by him, and purchased by the relator, where a *void* redemption has intervened between the date of the sale and the expiration of the time of redemption, 645.
16. A sheriff may execute writs delivered to his successor, in certain cases, 650.

SHERIFF'S DEED—*Vide* SHERIFF.

SHOWING CAUSE.

For or against an award under the statute, 40.

SIGNATURE.

1. The signature of land officers must be proven to justify the admission of their certificates, 97.
2. A bond executed by an attorney must be signed by the agent in the name of his principal, 197.

SISTER STATE.

1. Judgment rendered in a, 2.
2. It is slander in Illinois to charge one with the commission of a crime in a, 11.
3. The laws of, must be proven, 15, 492.
4. Notes made in a, 20.
5. Power of a *domestic* administrator in a, 227.
6. Legislative acts of a, how proven, 401.
7. Continuance, where a witness resides in a, 456.

SLANDER.

1. In reference to a crime committed in a sister State—*vide* SISTER STATE and 11.
2. The words must be proven as alleged, 147.
3. Declaration in the positive—proof in the disjunctive—variance fatal, 147.
4. Effect of a *repeal*, upon slanderous causes of action, 196.
5. *Equivalent* words will not sustain a declaration in slander, 286.
The words must be proved in substance, 286.
6. "*Common report*," no justification in slander, 612.
7. Courts seldom grant a new trial in slander causes, 612.
8. In *case*, by a female, for slanderous words, imputing want of chastity—the insertion of the words "*sole and unmarried*," as descriptive of the *status* of the plaintiff, and erasing the word "*adultery*," originally inserted in the declaration, and inserting by way of amendment the word "*fornication*" in lieu of "*adultery*"—is not such a material amendment as to entitle the defendant to a continuance of the cause, 653.

SLAVES AND SLAVERY.

In Illinois, 50, 112, 116, 129, 311, 336.

Vide also SERVANTS, REGISTERED SERVANTS, INDENTURED SERVANTS.

SOLICITOR—*Vide* ATTORNEY, ETC., and 43.

SOURCE OF TITLE.

Where parties claim from a common source of title, neither party is required to go behind the original patent or deed, 148.

Vide also EJECTMENT, TITLE.

SPECIAL AUTHORITY.

To be strictly pursued, 340.

SPECIAL CONSTABLE—*Vide* CONSTABLE.

SPECIAL COUNT.

Special and common counts may be joined, 220.

Where there are special and common counts on a bill of exchange or promissory note, and a copy of the bill or note is attached to the declaration, no copy of an account need be attached, 423.

SPECIAL DEMURRER.

Must assign causes, 220.

SPECIAL EXECUTION.

In *scire facias* to foreclose a mortgage, 299.

SPECIAL PROCEEDINGS.

In this class of cases, where the record is silent as to the giving of notice, no presumptions will be indulged in to support the regularity of the proceedings, 345, 448.

SPECIAL TERM.

1. Power of court to appoint a, 591.
2. Reasonable notice of, necessary, 591.

SPECIAL VERDICT.

Cases relating to, 106, 107, 149, 350.

SPECIFIC LIEN.

A mortgage is a, 197.

SPECIFIC PERFORMANCE.

Bills for a, 213, 387.

SQUATTERS UPON THE PUBLIC LANDS.

Their rights, 253, 280, 283, 285, 394, 423, 458, 578, 638.

STATE.

1. Lease of saline lands by the, 50.
2. Printing contract of the, 96.
3. Debts due the, may be released by legislature, 161, 197.
4. State cannot be guilty of laches, 249.
5. State not barred by the statute of limitations, 249.
6. State not bound by the general words of a statute, 283.
7. State bound for costs in certain cases, 489.

STATE BANK.

1. Can recover, though its issues were bills of credit, 74.
Contra, 235.
2. Debt due the bank is due to the State, 161, 197, 249.
3. Relation of State treasurer to the bank, 201.
4. Not liable for costs, 314.

STATUTES.

1. When a statute takes effect, 2, 466.
2. Statute of frauds, 34.
3. Arbitration statute, 40, 161.
4. Attachment statute, 42, 163.
5. Statute as to promissory notes, 148, 266, 323, 456, 599.
6. Construed in *pari materia*, 149.
7. Intention to control in construing, 149.
8. History to be consulted in construing, 149.
9. Forcible entry and detainer statute, 165.
10. Statute of frauds, 179.
11. Not construed prospectively, 181.
12. Statutes treating of inferior things, not to be applied to things of a superior dignity, 181.
13. Construction of the word "*person*" in a statute, 188, 283.
14. *Vide* CONSTRUCTION OF STATUTES.
15. Repeal of, effect, 196.
16. Inconsistent statutes, 205.
17. Statute as to administrators' and executors' bonds, 231.
18. Statute as to landlord and tenant, 251.
19. Change of venue statute, 257.
20. Set-off statute, 264, 417.
21. Dower statute, 333.
22. Sales by administrator under statute of wills, etc., 340.
23. Revenue laws, 345.
24. *Scire facias* statute as to mortgages, 197, 423, 424.
25. Statutes relating to vessel attachments, 445.
26. Statute as to depositions, 446.
27. Inclosure act, 448.
28. Abatement statute, 506.

STATUTE OF FRAUDS.

1. Promise to pay debt of another, 103, 217.
2. Fraudulent mortgages, 323, 327.
3. Interest in land, 329, 546, 659.

STATUTE OF LIMITATION.

State not barred by, 249.

Action of assumpsit, 291, 330.

STAY OF PROCEEDINGS.

Pending a motion to quash an execution, 120.

STIPULATION.

Parties bound by a written stipulation as to the proceedings in a cause, 310.

Effect of a breach of a stipulation, by one of several parties to a cause, 599.

STRANGER.

1. When one tenant in common sues a *stranger*, in trespass, for the conversion of the chattel held in common, he can only recover the value of the undivided moiety by way of damages, 172.
2. Where a note appears upon its face to have been given to secure a debt due by a stranger, and no consideration is expressed for the promise, a consideration must be averred and proved, 179.
3. A parol promise to pay the debt of a *stranger* is void under the statute of frauds, 217.
4. A moral obligation, coupled with an express promise, will not bind a *stranger* to the consideration, 253.
5. Where a *stranger* claims goods and chattels levied upon, under an execution, a notice which makes known his claim, forbids the sale, and informs the officer that he intends to establish his right, is sufficient, 316.
6. The declarations and acts of *strangers* not binding upon parties litigant, 318.
7. The act of a stranger, who recites that he acts for another is *prima facie* valid and binding, in cases of appeal and supersedeas bonds, 401.
8. The ratification of the act by the principal is equivalent to a precedent authority, 687.

SUBJECT MATTER.

1. An officer is justified in executing process, where the court issuing it had jurisdiction of the subject matter, and nothing appeared upon the face of the writ to apprise the officer that the court did not also have jurisdiction over the person of the defendant, 289.
2. Consent cannot confer jurisdiction to a court over the subject matter, where by law such jurisdiction had not already been conferred, 309, 317.

SUBMISSION.

To arbitration, 40, 146, 161.

In an action upon an award, a mutual submission must be averred, 507.

SUBSEQUENT.

1. Power of a court at a subsequent term, 48, 258, 268, 304.
2. Subsequent grant, 149.
3. Subsequent possession, 173.
4. Subsequent pleadings, 247.
5. Subsequent trial, 264.
6. Facts arising subsequent to an appeal, 266.
7. Subsequent suit, 268, 653.
8. Subsequent paper filed, may refer to a prior, 486.
9. Subsequent warranty, 500.

10. Subsequent contract, 658.
11. Subsequent acquisition of ferry landings by the grantee of a franchise which specified his ferry ways, 672.

SUBSTANCE.

The law regards *substance* in preference to *mere formality* and *technicality*, 188, 286, 454.

SUBSTITUTION.

The State leased saline land to A., reserving a re-entry for breach of the covenants contained in the lease. The covenants were broken; the agents of the State, instead of re-entering, *substituted* B. and C. as lessees in the place of B. The supreme court held the *substitution* illegal, 50.

SUBSCRIBING WITNESSES.

The ordinance of 1787, required three subscribing witnesses to a will; the will in question was signed by three, but one was a *devisee* under the will. This held a compliance, 32.

SUITORS.

Distinction between *voluntary* and *involuntary* suitors, 182.

SUMMARY.

1. Forcible entry, etc., is a summary remedy, 165.
2. Statutory motions are, 205.
3. A restitution is a summary proceeding, 565.

SUMMONS.

Must be under seal, 303, 309, 394.

Return to, 181, 263, 281, 282, 303, 344.

General summons, when void, 322.

When *capias* quashed, stands as a *summons*, 466, 532, 687.

Return day must be authorized by law, 466.

SUPERSEDEAS.

Quashing of, does not affect writ of error, 197.

May be executed by an attorney in fact, 401.

And his authority will be presumed, 401.

Issues upon "*probable cause*," 488.

Granted in "*doubtful cases*," 488.

A second application for a, will not ordinarily be entertained, 665.

A *certiorari*, improvidently issued, will be *superseded*, 680.

SUPERVISORY.

The supreme court exercises a supervisory control over all inferior tribunals, 416, 537.

SUPPRESSIO VERI.

A ground of relief in equity, 24.

SUPREME COURT.

1. What constitutes the record in the, 42, 287.

2. Comments of the court upon *insufficient* records presented for its consideration, 97.
3. When they will award a *certiorari*, 105, 471, 472, 519, 668.
4. When the court will remand a cause, 149, 327.
When not, 263.
5. When the court will enter the proper judgment or decree, 171, 247, 251, 270, 291, 294, 490, 463, 487.
6. Court will not notice objection not taken below, 161, 163, 166, 486, 613.
7. When judges divided, the decision below will be affirmed, 187.
8. When the supreme court will render a judgment *non obstante veredicto*, 247.
9. When court will act upon an imperfect bill of exceptions, 249.
10. Will affirm and reverse in part, 251.
11. Will amend its record, 258.
12. Will not presume in favor of technicalities, 263.
13. *Non-suit* awarded in, 270.
14. No *original* jurisdiction in habeas corpus cases, 291.
But will issue it, where necessary in the execution of its *appellate* power, 291.
15. No *original* jurisdiction to set aside a default rendered by an inferior court, 342.
16. Error in fact cannot ordinarily be assigned in the supreme court, 389.
17. Possesses a supervisory power over all inferior tribunals, 291, 416, 537, 533.
18. No error regarded by, unless specifically assigned, 423.
19. Will not entertain a *feigned* cause, 481, 544.
20. Court will not always reverse an erroneous judgment, 549, 612, 653.
21. In capital cases, where the judgment of conviction is affirmed, the court will fix the day of execution, 600.
22. Rule in supreme court as to new trials, 612.
23. Will not examine and decide *moot* questions or abstract propositions of law, 659.

SURETIES.

1. An oral promise to a surety is void under the statute of frauds, 34.
2. A surety upon an administration bond is not liable unless the administrator has been guilty of a *devastavit*, 96.
3. Mere delay to sue the principal does not discharge a surety, 126.
4. A clause in a bank charter which requires the board of directors to use diligence in the collection of debts due the bank, is directory merely, and their omission to do so does not discharge the surety, 126.
5. The court may discharge a surety for costs, in order that he may testify in the cause, provided a new bond for costs is executed, 138.
6. Liability of a surety upon a recognizance, 164.
7. The contract of a surety is to be construed strictly, and cannot be extended by implication beyond the words of the original contract, 201.
8. The sureties of the State treasurer are not liable for his acts or defalcations, as *ex officio* cashier of the State Bank, 201.
9. Where a subsequent duty is imposed by statute upon the State treasurer, his sureties are not liable for any acts of omission, commission, or defalcation in reference to the new duty imposed, 201.
10. Where two sign a bond—one as principal and the other as surety—both are principals, 436.
The only object of an obligor or promissor, attaching his name to a bond or note "*as surety*," is to secure evidence as between the principal and surety in an action for the recovery of the money paid by the surety for the principal, 436.
11. An attachment bond must be signed by the principal *and* surety, 464.

SURPLUSAGE.

1. Where a declaration contains one good and one bad averment, the latter, on demurrer, may be rejected as surplusage, if the count shows a good cause of action, 38.
2. Where a note is payable to A. & B., *agents of C.*, and A. & B. sue upon it, and the declaration sets out the note in *hæc verba*, the legal title is in A. & B., and the words "*agents for C.*" may be regarded on demurrer as surplusage, 97.
3. If a payee has indorsed a note, and yet brings suit upon it, describing himself as assignee, and also as payee, the declaration is good; the former allegation may be rejected as surplusage, 180.
4. Surplusage will not vitiate a statutory notice, 316.
5. Surplusage does not vitiate a warrant issued by a justice of the peace in criminal cases, 491.

SURVEYOR.

1. A county surveyor may give parol evidence of the location of a tract of land, 285.
2. Fees of a county surveyor, 444.

SUSPICION.

Based upon reasonable grounds, is admissible in justification of a suit for malicious prosecution, 318.

SWEARING.

1. Common-law arbitrators need not be sworn, 161.
2. If the submission is under the statute, the courts will presume they were sworn, 161.
3. What constitutes perjury, 228.

T

TAX DEED.

Under the revenue law of 1827, the tax deed is not *prima facie* evidence of title in the grantee of the auditor, 343.

TAXATION OF COSTS, 195, 515.

TAX TITLE.

1. The law in force when the land was sold for taxes must govern as to the form and effect of the tax deed, 345.
2. Under the revenue law of 1827, the purchaser at a tax sale must show a strict compliance with all of the requisitions of the law, 345.

TECHNICALITY.

1. The policy of the law is to try causes before justices of the peace upon their merits, and the appellate courts will not tolerate *technical* objections upon the hearing of an appeal involving the validity of their judgments, 310.
2. In case of judgments by default, the plaintiff is held to a rigid *technicality*, 344.
3. Technicality denounced by the supreme court, 564.

TENANT.

1. Estopped from denying his landlord's title, 125, 251.

2. A complaint in an action of forcible detainer must show the relation of landlord and tenant, 165.
3. To entitle a landlord to recover at *common-law*, in an action of debt for use and occupation, the plaintiff must aver and prove that the defendant entered in privity with the landlord's title or that the relation of landlord and tenant existed between them, 251.
And under the *statute*, the plaintiff must aver and prove that he was the "owner" of the land, and that the defendant was his express or implied tenant, 251.
4. A purchaser in fee from a tenant, with knowledge of the tenancy, is liable to the landlord for use and occupation, 251.
5. When a lease is offered in evidence in a collateral action between either party and a stranger, its execution must be proved, 350.
6. When a forcible detainer lies against a tenant, 398.
7. Proceedings by the tenant of the freehold in actions of ejectment at common law, 591.

TENANT IN COMMON.

1. Measure of damages in actions by one tenant in common for the conversion of the chattel by a stranger, 172.
2. May maintain an action of forcible detainer against his co-tenant, 437.
3. Oral evidence of the existence of a tenancy in common of land is inadmissible, where written evidence of the tenancy exists and is within the power of the party, 515.

TENDER.

Where a vendor covenants to convey, the vendee is not bound to prepare and tender for execution a deed to the vendor, 330.

TERM.

1. Power of court at a subsequent term, 187, 268.
2. Power of the supreme court to issue a writ of *habeas corpus* in term time, 291.
3. Effect of a statute changing the time of holding the term of courts, 466.
4. Appeals may be prayed at any time during the term, 487.
5. Writs void where a term intervenes between the test of the writ and return day, 548.
6. When a term is held at an unauthorized time, the proceedings are *coram non judice*, 466, 550.
7. Power of circuit court to hold a special term, 591.
8. The word "*term*" in the statute, relating to attachments in aid of a summons, means "*time*," 643.

TERRITORIES.

Power of Congress over the, of the U. S., 129.

TESTATOR.

Intention of a testator to be regarded in the construction of a will, 318.

TESTE.

1. An illegal teste of a writ legalized by the act of July, 1837, 389.
2. Where a term intervenes between the teste and return day of a writ, the writ is void, 548.

TESTIMONY.

1. Discretionary to permit an additional testimony after the argument has been commenced, 26.

2. Bill of exceptions lies for receiving improper, or rejecting proper testimony, 277.

TIMBER.

Penal action for cutting and felling, 642.
The cutting must be willful, 642.

TIME.

1. In the construction of contracts, 249, 635.
2. Time of service must appear in a sheriff's return to process, 282, 303.
3. Lapse of time will not overthrow the presumption of freedom, 112.
4. When statutes take effect, 466.
5. At law, the essence of a contract, 249, 635.
6. Word "*term*," in attachment statute, means *time*, 643.
7. Time of performance, when mistaken, may be corrected in equity, 671.

TITLE TO LAND.

1. In ejectment plaintiff must recover on the strength of his own title, 148.
2. Where parties claim under a common source of title, neither can dispute its origin or validity, 148.
3. Title under the ordinance of 1787, 148, 149.
4. Under an act of Congress, 149.
5. Under a governor's confirmation, 149.
6. Defendant in execution who desires a levy on land must exhibit his title, 183.
7. Title of landlord, 125, 251.
8. Possessory title to land, 173, 284—*vide also* POSSESSION.
9. Vendee when in default cannot dispute title of his vendor, 296.
10. Preemption title, 351.
11. Failure of vendor's title, 166, 532.
12. Under a sheriff's sale, 53.
13. Adverse title, 173.

TORT.

1. No writ of error lies upon a judgment in *tort*, after the death of the *tort feisor*, 120.
2. In actions of tort, the jury may find one of several defendants guilty, and discharge the others, 502.

And where there is no evidence as to one, the court may direct a verdict of acquittal, 502.

3. Torts not assignable, 578.

TOWN.

1. Where the charter of a town provides that *debt* shall lie for breaches of the town ordinances, a general summons, without specifying the form of the action, is void, 322.
2. Jurisdiction of justices of the peace in penal actions under a town ordinance, 591.
3. Town ordinance prohibiting sale of liquor, 591.
4. Suits must be brought in corporate name of town, 591.
5. No precedent action of the town counsel is necessary to authorize the institution of a suit to recover a penalty incurred for the infraction of a town ordinance, 591.

TRANSCRIPT.

1. Of judicial proceedings under the constitution and laws of the U. S., 48, 80, 467.
2. In appeal causes, the transcript must be filed by the third day of the term of the supreme court, 197.

3. *Certiorari* for a perfect transcript on an allegation of diminution, 471, 624.
4. Cannot be withdrawn upon dismissal of an appeal, with a view to a writ of error, 472.
5. State bound to pay clerk's fee for transcript in civil cases, where it is a party, 489.
6. Must be certified under the seal of the court, 624.

TRANSITORY ACTIONS.

The circuit courts have jurisdiction in all transitory actions where the defendant is found within the territorial jurisdiction of their respective courts, 575.

TREASURER.

1. Notice to delinquent State treasurer, 188.
2. Liability of the sureties of the State treasurer, 201.
3. Power of county treasurer, 422.

TREATY.

Does not divest vested rights, 148.

TREES.

1. Nursery trees are a part of the freehold, 142.
2. Cutting down timber trees, penalty for, 642.

TRESPASS.

1. *De bonis asportatis*, description in, 7.
 Against a sheriff, 23, 87, 499.
 Against a constable, 345.
2. *Vi et armis*, 89, 100, 116, 336, 343, 502.
3. *Quare clausum fregit*, 173, 284, 285, 578.
4. In trespass, all are principals, 310.
5. Jurisdiction of justices of the peace, 598.
6. Trespass for cutting timbers, 642.

TRIAL.

1. Without a joinder of issue, when a waiver of the omission, 226.
2. Of appeals from justices to circuit court, are *de novo*, 265, 465.
3. Trial by court, no bill of exceptions lie, 277.
4. Of the right of property, 316.
5. Issues of fact must be tried by jury, 465.

TRICKERY.

Of lawyers, condemned, 564.

TROVER.

For a levy under a void writ, 499.

U

UNCERTAINTY.

1. In judgments and verdicts, 317.
2. In pleadings, 503, 516, 532.

UNCONSTITUTIONAL STATUTES.

Bills of credit, 74.

Poll tax, 112.

UNDISPOSED OF PLEA.

Error to render judgment by default where a plea is on file, 516, 567.

UNDIVIDED INTEREST.

Where a stranger converts a chattel belonging to tenants in common, one tenant bringing action for the injury can only recover the value of his undivided interest, 172.

UNION.

Power of a State after admission into the Union, 129.

UNITED STATES, 80, 148, 226, 235, 283, 285, 287, 333, 554.

UNIVERSALIST.

A competent witness, 23.

UNLIQUIDATED DAMAGES.

Growing out of a breach of the contract sued on, may be set-off, 417.

UNSEALED WRITINGS.

Profert of, unnecessary, 8.

USE AND OCCUPATION.

When action lies for, 251, 296, 503.

USURY.

Must be pleaded, 297.

Usury statutes are penal, 677.

V

VACANCY.

In office of clerk of circuit court, 298.

VACATION.

Power of supreme judges in, 291.

Execution of a writ of inquiry in, 300.

Sheriff's bond may be filed in, 650.

VAGUENESS.

A vague admission not to be relied on, 317.

VALUE.

1. Need not be averred in declaration in trespass, *de bonis*, etc., 7.

2. Of State paper, 96, 221.

3. Verdict in larceny must find value, 392.

VARIANCE.

1. In debt on bond, 41.

2. In debt on records, 48.

Where the record is a mere inducement, 318, 345.

3. Between writ and declaration, 164, 182.
4. In action upon a note, 220, 390, 413, 462, 568.
5. How objection taken. 287, 569.
6. In larceny, 329.
7. Between judgment and appeal bond, 472.
8. In action upon contracts generally, 545.
9. In indictment for having in possession forged bank notes, 590.

VENDEE OF LAND.

Demand of deed necessary, 82.
 Need not prepare deed, 330.
 Actions against, for consideration money, 106, 166, 494, 635.
 Liability of, when in possession under a parol contract, 296.
 Bill for performance, 387, 473.
 Rescission of contract, 473.
 Vendee under the U. S., 578.

VENDOR OF LAND.

Duty and rights of, 82, 106, 166, 171, 296, 330, 494, 500, 611, 635.
Vide also VENDEE and SPECIFIC PERFORMANCE.

VENIRE.

When lost may be filed *nunc pro tunc*, 424.
 Special, for a grand jury, 600.

VENIRE DE NOVO.

When awarded by supreme court, 105, 173, 400, 575.

VENUE.

Proceedings in civil actions on change of, 163.
 Change of, in criminal cause by one of several defendants, 257, 413.
 Notice of motion to change, 276.
 Transitory in trespass *vi et armis*, 343.

VERBAL.

Promise to pay debt of another, 34.
 Extension of time of performing a written contract, 659.

VERDICT.

What irregularities cured by verdict, 13.
 In capital cases, prisoner must be present when verdict returned, 65.
 Verdict upon several counts sustained, though some bad, 121.
 And judgment must be construed together, 317.
 In larceny, should find value of property stolen, 392.
 When verdict defective, judgment reversed, 400.
 When verdict exceeds *ad damnum*, plaintiff may remit excess, 461.
 Jury retiring with instructions to return a sealed verdict, 530.
 In ejectment, 561.

VESSELS.

Attachment against, 445.
 Common carriers, 580.

Bill of lading by, 580.

Re-shipment by, 580.

VESTED RIGHTS.

Cannot be disturbed by legislation or judicial decisions, 454, 654.

No vested right in a public office, 461.

VIDELICET.

Does not aid a defective averment, 567.

VOID AND VOIDABLE.

1. *Capias ad respondendum*, 179.
2. Executions, 183, 301.
3. Promise, 217.
4. Note, 183, 246.
5. *Capias ad satisfaciendum*, 179, 289.
6. Parol sale of land, 296.
7. Summons, 309, 548.
8. Administrator's deed, 340.
9. Contract of infant, 430.
10. Judgment, 454, 645.

W

WAIVER.

Of original pleas, by filing new ones, 106.

Demurrer waives a motion, 110.

A plea is a waiver of a demurrer, 110, 247, 321, 330, 524, 531, 548.

Of non-joinder of issue by proceeding to trial, 226.

Of a jury, effect of, 280, 310, 323, 343, 349, 539, 613, 668.

Of an irregular appeal by proceeding to trial, 316.

A rejoinder waives demurrer to replication, 423, 532.

A trial upon issues of fact waives all irregularities, 439.

A trial by jury can only be waived by an entry of record, 465.

Appearance and pleading waives defective process, 569, 643.

Plea in abatement—demurrer thereto—sustained; defendant thereupon pleads in bar; this waives the plea in abatement, 687.

WARD.

A guardian *ad litem* for infant defendants should deny the allegations of a bill in equity exhibited against his wards, 546.

Exceptions to the rule, 546.

WARRANT.

At common-law, and by statute, a justice may appoint a special constable to execute a warrant in a criminal cause, 89.

WARRANTY.

1. Upon the sale of a chattel, should be made at the time of the sale, or, if made subsequently, must be based upon a new consideration, 500.
2. A vendee of a chattel cannot recover damages for a defect in the thing purchased, unless the vendor made a false representation, or warranted the article, 500.

3. No particular words are requisite to constitute a warranty in the sale of chattels; but the vendor must affirm a fact, upon which the vendee relied, which turns out to be untrue in point of fact, 500.
4. A mere *opinion* as to the class or quality of the thing sold, made by a vendor in a bill of parcels, does not constitute a warranty, 500.

WHARFING PRIVILEGES IN CHICAGO, 535.

WIDOW.

1. Is only entitled to dower in *legal* or *equitable* estates of inheritance, 333.
She is not endowable of a preëmption right, 333.
2. Requisites of her petition for the assignment of dower, 333.

WIFE.

1. Where husband and wife join in the execution of a mortgage, both are proper parties to a proceeding to foreclose the same by *scire facias*, 423.
2. Dower of wife does not pass unless she acknowledged the execution of the deed of her husband upon a privy examination, etc., 591.

WILLS AND TESTAMENTS.

1. Construction of wills, 318.
2. Probate of wills, 585.
3. Under the ordinance of July 13, 1787, 32.

WITNESSES.

1. A universalist is a competent witness, 23.
2. To a will, 32, 585.
3. Where a party tampers with a witness, and undertakes to refresh his memory, the circumstance, to say the least, is suspicious, 317.
4. When fees must be tendered to a witness, 330.
5. A witness, when sworn in a cause, is bound to tell "the truth, the whole truth, and nothing but the truth," 394.
6. Where a bill of exceptions does not affirmatively show that a question propounded to a witness was illegal, the judgment will be affirmed, 440.
7. If an attorney in a cause writes or dictates the answer of a witness, his deposition is illegal, 446.
8. Absence of a material witness, when a cause for the continuance of a suit, 330, 456, 641, 665.
9. When a witness swears that he carried a message relating to the cause in controversy, from the defendant to the plaintiff, the reply of the latter is admissible on cross-examination of the witness, 458.
10. An arbitrator may examine a witness during the absence of both parties, 524.
11. Where the court refuses to permit pertinent and relevant questions to a witness, a bill of exceptions lies, 551.
12. Indictment lies for wilfully and corruptly refusing to issue a *subpœna* for a witness, 649.
13. The recall of a witness after close of the testimony is discretionary, 26, 653.
14. Where a question is put to a witness and answered, in the face of an objection, the supreme court will not reverse the judgment for the illegality of the question, unless the bill of exceptions shows the answer of the witness to the question, 653.
15. All persons are competent witnesses who are not parties to the record, who have a sufficient understanding, and who are not disqualified by interest, crime, or the want of a proper moral obligation to speak the truth, 200.

16. The interest which is necessary in order to disqualify a witness must be in favor of the party calling him, 200.
17. Where the interest of a witness is equally balanced between the contending parties, he is competent to testify, 200.
18. In a trial of the right of property, the defendant in execution is a competent witness, 200.

WORDS OF SLANDER.

The words "*he swore to a lie*" in a declaration for slander are not actionable, unless without a *colloquium* setting forth the circumstances under which the words were spoken, 10.

WRITS AND PROCESS.

1. Variance between writ and declaration, 164, 182.
2. Of *capias ad respondendum*, 687.
3. Of *capias ad satisfaciendum*, 179, 289.
4. Of attachment, 496.
5. Of summons, 303, 309, 548.
6. Of *scire facias*, 299—*vide* SCIRE FACIAS.
7. Of inquiry, 210, 300, 311.
8. Of error, 165, 207, 311, 403, 466, 488, 624—*vide* ERROR.
9. Return to original process, 181, 303—*vide* RETURN.
10. Must be under seal, 303.
11. Teste of, 389, 548.
12. Return day of, 548.
13. Of two "*nihilis*," 9.
14. Of *feri facias*, 183, 301.

WRITTEN INSTRUMENTS.

1. Must name the contracting parties, 97.
2. Which contain mutual covenants, not assignable, 200.
3. Containing covenant for personal service, not assignable, 200.
4. Law in force when made, form a part of the instrument, 201.
5. Construction of, a question of law, 249.
6. In suits upon, copy annexed to declaration no part of declaration or record, 287.
7. When sealed, import a consideration, 294, 331.

FINIS.

